No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

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CHET L. PARKER and LOIS M. PARKER,

Appellants,

vs.

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,

Appellees.

BRIEF OF APPELLANTS CHET L. PARKER AND LOIS M. PARKER

Upon Appeal from the District Court of the United States for the District of Oregon

HON. GUS J. SOLOMON, District Judge.

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BRIEF OF APPELLANTS CHET L. PARKER AND LOIS M. PARKER

Upon Appeal from the District Court of the United States for the District of Oregon
HON. GUS J. SOLOMON, District Judge.

JURISDICTIONAL STATEMENT

While there was but a single judgment order entered in the District Court, this appeal, by defendants Chet L. Parker and his wife, Lois M. Parker, is from what in substance are two judgments against them, one in favor of appellee Title and Trust Company and the other in favor of the several appellees Winans. In each case, the jurisdiction of the District Court is based upon diversity of citizenship.

The amended complaint filed by Title and Trust Company alleges that it is an Oregon Corporation, that appellants Parker were residents of the State of Washington at the time of the commencement of the action (R. 3), that the action involves a title insurance policy in the amount of $125,000.00, and that the amount in controversary exceeds $3,000.00, exclusive of interest and costs (R. 4). These allegations are admitted in the answer (R. 51).

Appellees Winans, in the lower court designated Third Party Defendants, filed a cross-claim charging that these appellants were guilty of slander against them in statements made by them to Title and Trust Company. They allege (R. 84), and the Parkers admit (R. 93), that the Winans are citizens of the State of Oregon and that the Parkers are residents of the State of Washington.

The jurisdiction of the District Court is therefore based upon 28 USCA, sec. 1332, and of this court upon 28 USCA, sec. 1291.

THE TITLE AND TRUST JUDGMENT

From this point on, this brief will first be devoted to the Parkers' appeal from the judgment of Title and Trust Company against them, until that subject is concluded, to be followed by their contentions regarding the judgment of appellees Winans against them. While some of the facts referred to in this first portion of the brief will be material in the latter portion involving the Winans' judgment, an attempt will be made to keep the two subjects segregated as much as possible.

STATEMENT OF THE CASE
(Title and Trust Judgment)

The question involved in this appeal is whether an owner's title insurance policy issued to these appellants, the Parkers, by appellee Title and Trust Company, dated September 12, 1951, is a valid policy so that a loss sustained thereon should be paid, or whether, as the court held, it is invalid and should be cancelled.

Among the admitted facts are the following: Chet Parker, one of the appellants and hereinafter sometimes referred to as Parker, ordered and received a title report from the Hood River Branch of the Title Company, paid the premium therefor, (F. 20, 21, R. 128-9), later obtained a purchaser's policy (F. 24, R. 130), and finally the owner's policy (F. 41, R. 139) each insuring the title to the property, with no exceptions material to this case. These three documents are in the Record, pages 32 to 48.

Shortly prior to the issuance of the owner's policy, the Title Company learned that the United States Government claimed title to a portion of the property (F. 41, R. 139) (this portion being referred to in the record as Lot 2). Though this property is in a Section 16, and therefore, under the Admission Act, title to it would normally pass to the state as "School Lands" (F. 6; R. 120-1), it is apparently now admitted by all that, despite the explicit language of the Admission Act, (R. 120-1), such transfer of title, because of decisions of the United States Supreme Court, e. g., *United States v. Morrison,* 240 U.S. 192, did not take place (R. 118).

The reason for this is that prior to any survey of that portion of the section in which Lot 2 is situated, the United States by Presidential Proclamation had this property set apart as part of the Mt. Hood Forest Reserve (R. 121-2). This defect in said title, as the court's opinion pointed out, "could have been discovered by the title company by a proper examination of the statutes and records, all of which were available to it" (F. 40; R. 139). Furthermore, no representations of any kind had been made to the Title Company by any appellant respecting the state of the title (Findings 31, 32, R. 134-5).

As the court's opinion further pointed out: "Ordinarily, under those circumstances a title company should be required to respond in damages for a failure of title to property covered by its policy." (R. 107)

However, recovery was denied because of the court's belief that there had been a conspiracy on the part of the Parkers and appellant Stegmann to defraud the title company by "concealing" from it information the Parkers were said to have had regarding the claim of the government. (R. 107-14)

This conspiracy, according to the opinion and findings, was formed on August 16th, 1951, after the Parkers obtained the title report and learned that it did not contain an exception of the claim of the United States Government. (F. 35; R. 136) The court also found—although this was denied by defendant Parker—that between the time that the title report was ordered and the date of its receipt Stegmann and Parker had been

advised by forest rangers that the title to a portion of this property was "in question" (F. 17; R. 127-8). There was also evidence that prior thereto Paul Winans had advised Stegmann of the claim of the government (F. 15; R. 125).

Two further contentions were asserted by the Title Company to defeat the policy, each of which was upheld by the court. These were (1) that the purchaser's policy of title insurance (which, it will be recalled, was supplanted by the owner's policy) contains a provision requiring immediate notification to the company upon receipt of any notice of defect of title, and that there was such a notice of defect and a failure to give such notification (R. 114-5, 139-40); and (2) that during the later negotiations for a settlement of the claim on the policy the Parkers represented they had paid $120,250.00 for the two lots covered by the policy and the court found that they had paid only $95,250.00 (R. 15, 140-1). The positions of appellants on these points are both that the findings are not supported by the evidence and also that these assumed facts would not legally constitute defenses to the policy.

Further facts, and some of the evidence, will be set forth hereinafter.

The principal questions involved are, therefore, (1) whether the evidence justified the court's conclusion that such a conspiracy to defraud the title company was formed; (2) even though it should be held that such a conspiracy existed, would it, in view of the other facts of the case, invalidate the policy of title insurance; (3)

whether the Parkers had notice of a defect, within the meaning of the purchaser's policy while they had that policy, and, if so, whether a failure to give notice of such defect is a defense to a claim under the later owner's policy; (4) whether in later negotiations for a settlement of the policy the Parkers falsified as to the amount paid for the properties covered by the policy and if so whether such fact is a defense to the policy. In short, the Parkers contend that the court was in error both upon the facts and the law in canceling the policy, and that judgment should have been entered in favor of the Parkers for the loss sustained by them as a result of this defect of title.

SPECIFICATION OF ERRORS
(Title and Trust Judgment)

(1) The court erred in entering judgment canceling the title insurance policies issued by the Title Company to appellant Chet L. Parker (R. 148) and in refusing to enter a judgment for him against the Title Company on the policy.

(2) The court erred in finding: that Paul Winans made a complete disclosure to Stegmann concerning the facts regarding his information of the claim of the United States and of a settlement he had obtained from a title company F. 15; R. 125); that Winans ever offered the two lots separately for different prices (F. 16; R. 125-6); that Chet L. Parker was advised by U. S. Forest Service representatives that the title to Lot 2 was in question (R. 127-8); that appellant Parker was not

present with Paul Winans on August 18, 1951 (F. 18; R. 128); that Parker was ever introduced to Winans as a surveyor or that Winans on August 31 or at any other time discussed with him the nature or basis of the claim of ownership of the United States or the settlement of a former insurance policy by Winans with another title company (F. 22; R. 129; F. 33, R. 135) ; that Paul Winans and Vawter Parker were unaware of the fact that Kenneth Abraham was representing appellants Parker or thought he was representing appellant Stegmann or that Winans advised Abraham respecting the claim of the United States prior to the delivery of the deed to Abraham (F. 26; R. 131-2); that Stegmann at any time was the agent of appellants Parker in negotiating with Winans, or that Parkers concealed from Winans the fact that they were purchasing the property or that Winans was unaware of that fact (F. 28; R. 133-4); that the Parkers concealed any facts from the title company (F. 29, R. 134; F. 37, R. 137-8; F. 38, R. 138); that prior to receiving the deed from Winans the Parkers knew of the claim of the United States to Lot 2 or that Ethel Winans had theretofore collected a substantial loss on a title policy by reason of the government's claim (F. 30; R. 134); that there was any scheme by Parkers to defraud the Title Company or that the issuance of a title report and title policies by the title company was "a necessary element in the scheme of defendants Parker . . . to defraud the plaintiff (F. 33; R. 135); that appellee Paul Winans did not represent to appellants Parker that Winans had a marketable title to Lot 2 (F. 34; R. 135-6); that on or about August 16, 1951, or at any other time prior to September 14, 1954,

appellants Parker knew the status of the title to Lot 2 or knew what information the Title Company had or at any time entered into any conspiracy to defraud the title company (F. 35; R. 136); that any act or statement by Parkers was pursuant to any conspiracy or for any improper purpose, or that they knowingly made any false representations to the Title Company with respect to the consideration paid by them or to the assignment of an option to them or of any other matter whatsoever or that said assignment was not bona fide (F. 36; R. 136-7); that the Parkers concealed from the Title Company any knowledge on their part respecting any defect in title (F. 37; R. 137-8), or concealed from the Winans family the fact that the Parkers were the persons negotiating for the purchase of the property or were obtaining title insurance (F. 38; R. 138); or that the Title Company relied on anything other than its examination of its records and some, but not all, the public records of the State of Oregon (F. 39; R. 138); or that the Parkers were guilty of any fraudulent conduct whatsoever (F. 41; R. 139); or that the Parkers received any notice of defect to the property prior to September 4, 1951, or that they did not give prompt notification to the Title Company after receiving any such notice or that any such failure was prejudical to the Title Company or constituted a breach of any policy provision (F. 42; R. 139-40); or that during negotiations with the Title Company the Parkers made any false representations (F. 43; R. 140-1).

Additional specifications of error with respect to the findings bearing upon the alleged liability of appellants

Parker to the Winans will be set forth in the portion of this brief devoted to the appeal from the Winans' judgment.

(3.) The court also erred in its Conclusions of Law (R. 144-5): that the equities were with the title company and against appellants Parker (II): that defendant Stegmann in all negotiations acted as the agent of appellants Parker or that communications received by him were within the scope of his authority (III): that appellants Parker were guilty of any misrepresentations to or concealment from the title company or that any wrongful acts on their part caused the issuance of the policies of title insurance or that the Title Company was entitled to a decree cancelling the policies (IV).

(4.) The court also erred in admitting a large amount of evidence of former transactions between appellants Parker and appellant Stegmann, and also of prior transactions between either or both of them and third persons, such evidence having no relevancy whatsoever upon any issues in this case and particularly having no relevancy on the contention that the Parkers and Stegmann entered into a conspiracy or that the Parkers intended or attempted to defraud the Title Company, all said evidence being of the type generally referred to as *res inter alia acta*. Inasmuch as this specification of error is based upon the irrelevancy and lack of any probative value of any such evidence, it is believed that, since the case was tried to the court without a jury, elaboration upon this specification of error is unnecessary at this point. Such elaboration will be made in the argument. (See infra, pages 39 to 45.)

SUMMARY OF APPELLANTS' ARGUMENT

Briefly, our contentions here are:

First. The Parkers deny that they had any information regarding the alleged claim of the Government until advised of it by the Title Company just prior to the delivery to them of that company's Owner's Title Policy; and it is our further contention that even though such information had come to the Parkers they would have been under no legal obligation to disclose it to the Title Company, and that a failure to do so would not be a defense under the policy. Further (without admitting that there is evidence of a "conspiracy"), we contend that no such obligation is created if two persons "conspired" not to disclose this information to the Title Company.

Second. There is admittedly no direct evidence of any so-called "conspiracy" between Stegmann and Parker to conceal from the Title Company information regarding this claim of the Government. The indirect and circumstantial evidence claimed to establish it consists of other facts and transactions entirely unrelated to the transactions here involved. Evidence of these unrelated transactions is not proof of any such alleged conspiracy.

Third. Our position relative to the other points, that the policy was avoided (a) by a failure to notify the Title Company of a defeat in title, or (b) by falsely stating the amount of the purchase price, has already been fully stated.

ARGUMENT

1. Statement of Additional Facts

Before discussing the relevant authorities, we desire briefly to present additional facts:

Additional Facts Leading Up to Purchase of Property and Issuance of Policy

On August 11, 1951, Paul Wimans, who was representing himself and the other appellees Wimans, gave an option to Walter Stegmann (who was a defendant in this case and is prosecuting a separate appeal) to purchase the property involved in this case. Stegmann paid $1,000.00 for the option, and the purchase price was to be $100,000.00. The option is in evidence (R. 30-1). While the property consisted of a single tract, it has for purposes of convenience been designated in this case as Lots 1 and 2. Lot 1, consisting of 15.80 acres, does not have the defect in title involved, this title defect covering the Northeast quarter of the Northwest quarter of Section 16, referred to in the record as Lot 2. As already stated, the reason for this defect is that although both tracts are in Section 16, normally school lands, there was a government survey of only a portion of the section—that in which Lot 1 is located. Any standard map or plat shows this. (See, e. g., that attached to the complaint at R. 15).

When Wimans gave this option, he knew of this claim of the Government. In fact, in 1943, with knowledge of this claim, he and his family, after being unable to sell

this property to the Government because of this defect, had obtained a title insurance policy through the same Hood River office with which Parker dealt, but in another title company; and shortly thereafter they collected from that company the sum of $3,000 in satisfaction of their claim against the policy. (R. 849-78; 2164-81)

Parker learned of this option the day after it was given, that is, on Sunday, August 12. (R. 211-15, 698, 1523-4). Stegman had obtained the option apparently with the idea of reselling it at a profit and he offered it to Parker. Parker was immediately interested. This interest arose from the fact that a few months theretofore he had sold a tract of timber to Multnomah Plywood Corporation, whose plant is in Portland (1221-3, 1370-1); and he knew that that company was looking for peeler logs, such as were to be found in the Hood River area.

Accordingly, the next day Parker went to Hood River and there did the following: (1) Ordered a title report from the Title Company's Hood River office (F. 20; R. 128-9, 193-4, 203-4, 221-2, 233-4), at which time he was told that there was already an outstanding title policy on the property (R. 193-4, 233, 351-2); (2) communicated by telephone with Multnomah's timber buyer and its timber cruiser, who were in Eugene, about 200 miles from Hood River, asking that the latter prepare to cruise this tract of timber as soon as possible (R. 1307-9); and, (3) visited the tract and spent some time making a rough cruise estimate of the amount and value of timber thereon (R. 224-7, 246-7).

That evening the Parkers met with Stegmann and obtained an assignment of the option. In addition to the $1,000 down payment, the option provided for an additional $4,000 payment upon the exercise thereof. (R. 238-52; Ex. C, R. 31) The Parkers and Stegmann testified that Stegmann was then given a $25,000 check (Ex. 40 A, R. 2112) for his rights under the option, it, however, being agreed that he should pay the additional $4,000 to Winans without further reimbursement, and should give notification of the exercise of the option (R. 246-7, 251-2). The Title Company claimed that the $25,000 check to Stegmann was a phony, and the court so found. (R. 111, 114, 137)

Parker proceeded to negotiate with Multnomah's timber buyer. He offered to sell the timber to that company for $180,000 under a long-term financing agreement which contemplated also modifying the terms on deferred payments for the other timber theretofore sold to it, mentioned above. (R. 1280-3, 1373-8) The matter was presented to the Board of Directors of Multnomah (1283-7), on August 20, the minutes of the meeting being in evidence (R. 2239-40).

Thereafter, the company's timber buyer, two of its loggers and two members of the Board visited the property and examined the timber. (1287-97). Both the company's buyer and its cruiser testified the property was well worth $180,000 and recommended the purchase. (1297-1306; 1330-4) On August 24, the Parkers and Multnomah's timber buyer met in the office of the attorneys for Multnomah, Messrs. Koerner, Young, Mc-

Colloch and Dezendorf, and conferred with attorney John Bledsoe of that firm, representing Multnomah. They directed him to prepare a contract, embodying the terms of their tentative agreement. (R. 1221-8; 1298-1300; 1380-1) This sale eventually did not take place, largely because the President, who had been absent form the city, did not approve it on his return. (R. 1225-6; 1326-7; 1381)

In the meantime, on August 16, Parker obtained his title report. (R. 206-11). On August 29, when Parker still thought the sale to Multnomah would go through, he was discussing another legal matter with an attorney, Lincoln Ferris, in Portland, and mentioned this proposed sale to Multnomah. Parker was laboring under the misconception that until he obtained title to the property he could not obtain a title insurance policy. He told the attorney he was in a quandry as to how to proceed because, though he had a title report, he knew Multnomah would wish a title insurance policy and, for the reason just stated, he could not then obtain one. The upshot of it was that Ferris telephoned the president of appellee Title Company, Edward Dwyer, who assured him that Parker was mistaken. He could not get an *owner's* policy but could get a *purchaser's* policy. (R. 287-90, 1231-9) Dwyer requested that Ferris bring to the office of the Title Company the option itself and the assignment, for inspection. This was done, and these documents were examined by title experts of the Title Company. (R. 1233-7). The option which they then examined, it should be pointed out, contained language which set forth, clumsily disguised, a limitation of optioner's liability, as follows (R. 31):

> "For which The Seller agrees to deliver a good and sufficient deed of conveyance showing title free and clear of all mortgage, contract, judgment or tax liens, conveying to The Buyer *all the right, title and interest of The Sellers* to the above described real property." (Italics added.)

This, if noticed at all by the Title Company, was satisfactory to it.

Accordingly, the next day the Title Company, at its Hood River office, accepted an order from Parker for a purchaser's title insurance policy. The assignment, or a copy thereof, was left with that office. (F. 23, R. 129-30) This policy was delivered September 4th. (F. 24, R. 130)

Because of delays, due largely to arguments respecting the setting apart of a portion of the property to be reserved by the Winans, the actual delivery of the deed was postponed until September 11. (R. 132) Parker had, in the meantime, arranged with the title company to exchange his purchaser's policy for an owner's policy, (Finding 27, R. 132-3, 176-7) He and Mrs. Parker called at the company's office—it is believed the actual date was September 14—and made this trade. (R. 322, 324)

However, in the meantime, the manager of the Hood River office, while at the court house two days before to make the final check on the state of the title, met a man from the Forest Service ranger station and in talking to him learned that the Government claimed title to Lot 2 (R. 176-7). The manager disclosed this fact to Parker when the latter called for the owner's policy but advised

him that inasmuch as a purchaser's policy had been issued, the company would give him the owner's policy, and this was done, with the approval of the Portland office (R. 176-7).

Parker consulted his lawyer, who advised him that he had nothing to worry about—the Title Company couldn't make a mistake of that kind (R. 326-7, 366).

But a few days later Parker received a letter from the Forest Service advising him of the Government claim (R. 326, Ex. 101, R. 2207). This letter was dated September 27, 1951, but on September 25 Parker's attorneys gave written notice of his claim to the company (R. 2215-6). There were quite extended negotiations with the title company. There were offers of settlement by the Title Company, introduced in evidence by it in this case (R. 1901-13). These negotiations are not particularly pertinent to this part of our argument, but will be discussed more later.

In addition to the notice which the Parkers obtained from the Hood River manager at the time of the delivery to them of the owner's policy, there is evidence of three other occasions, prior thereto, of notice of a possible defect in title. Two of these occasions involve alleged notice to Chet Parker, both of which are denied by him; and the third, after the deed was delivered but before it was recorded, was notice to Mrs. Parker, admitted, and in fact testified to, by her. We briefly relate these.

The first of these was the alleged incident, already noted, concerning which two forest rangers testified,

They said that two men visited the station on the evening of August 13 (F. 17, R. 127-8). This, it will be recalled, is the day on which Parker ordered the title report and inspected the property, and, later, obtained an assignment of the option. They testified that these men inquired about the Winans property, that they were shown the "status book" and told that Winan's title to Lot 2 was "questionable" and "not clear" (R. 1050, 1058-61, 1068-70). This information was itself obtained from the status book, which designated Winans as owner, the rangers having no further information regarding it. Photostatic copies of the relevant pages are in evidence (R. 2183-4). At the trial, about seventeen months after this event, they identified these two men as being Stegmann and Parker (R. 1056-7, 1071). Parker vigorously denied that he was at the Ranger Station on that date (R. 1362-5, 1405-10, 1424-6) or that he ever was given this information. Stegmann testified that he might have been there, but not with Parker (R. 1529-30, 1584-7).

Paul Winans, who it will be remembered handled the sale, testified that on many occasions he told various persons of the claim of the government, and, also, of the fact that his family had obtained the title insurance policy in 1943, related above, and on the basis of this defect had made a compromise settlement. He testified that he explained this claim of the Government to Mr. Stegmann. He also said that on August 31, 1951, being the day after the purchaser's policy was ordered by Parker and the premium therefor paid, and two weeks after Parker had obtained the title report— while he and

Parker, with Stegmann and others, were on the property in connection with surveying activities—he talked about the title difficulties, the claim of the government, the steps he was taking to clear the title by an Act of Congress, and related matters. There was difficulty keeping his testimony on the subject at hand and it is impossible to determine from his testimony when he claimed to have been talking to Parker and when to Stegmann and others (R. 831-5). Parker denies there was any such conversation. We set forth the testimony on this point in Appendix A.

The third occasion when it is claimed such notice was given was at the time of the delivery of the deed. Neither of the Parkers was present at that time, they being represented by attorney Kenneth Abraham of Hood River. Either immediately after the deed was taken by Abraham (R. 961) or while it was lying on the table together with the cashier's check for the final payment of $95,000.00, Winans made a statement which we believe is illuminating both as to the extent of the defect and also as to explanations, if any, which Winans may have theretofore made to Stegmann and to Parker, as he claims to have done. This statement as testified to by Abraham, as a witness for the Title Company, is as follows:

> "A. Well, Mr. Winans who was standing during that entire time, as I recall it, and I was standing because I was anxious to leave, said to me, he said, 'If Mr. Stegmann had been here I had intended to tell him concerning a defect in title having to do with a claim of the United States Government,' and he said, 'Since Mr. Stegmann is not here, I would like to tell it to you,' and he said, 'I would

suggest that he not record the deed because I think that this defect can be better clarified by possibly Congressional action in the name of the Winans family rather than in the name of Stegmann.' I think he must have spent another couple of minutes trying to explain what the defect is. I do not yet know to this day exactly what the nature of the defect is. I have not gone into it" (R. 943).

* * * * *

"A. He did not refer to the defect as being serious. He felt that the defect was one which could be corrected.

Q. Did he indicate that it was more technical than real?

A. I would say that he indicated it was more technical than real, yes" (R. 956).

* * * * *

EXAMINATION BY THE COURT

"Q. Would you think that a man who told you that it was necessary to have Congressional action to clear up a defect was representing that the defect was merely technical?

A. Well, I think that in saying 'technical' I was using his own term. I did not have any opinion at all with regard to the nature of the defect or whether it was substantial or not substantial" (R. 961).

As the court correctly stated in the findings, Abraham's employment was not "to obtain information regarding the title to Lot 2" (F. 26; R. 131), but he later—probably after the deed had actually been recorded—advised Mrs. Parker of what Winans had said, but told her there was nothing to worry about. Prior to the trial he had entirely forgotten that he told her about it (R. 957). That Mrs. Parker was concerned about it, however, is evidenced from an entry which she made in a sort of diary maintained jointly by herself

and her husband (R. 1453-5, 2226), although as she wrote in the diary: "Mr. A. says it wasn't important. As Title and Trust didn't show anything, it must not be." This diary was introduced in evidence by counsel for the Title Company (R. 1462). The Title Company's representatives first learned of the above conversation from Parker or his attorneys (R. 1785).

2. Legal Obligation to Title Company of Applicant for Title Insurance

We now proceed to a consideration of the legal problem as to what, if any, duty the Parkers might have owed the Title Company to advise them concerning information alleged to have been learned by them. In so doing, while strenously denying that the Parkers had notice of the claim of the government, we shall assume that they did. But we call attention to the following admitted facts:

(1) Nobody contends that anybody told Parker that Winans did not have title to the property. The contention is merely that he learned there was a defect in the title. Winans always contended that there would not be a great deal of trouble in clearing it. One of plaintiff's witnesses, a surveyor named Haynes, when asked about statements made by Winans to Stegmann regarding this claim of the government, seemingly was more impressed by the arguments advanced by Winans that the government's claim was without merit, than with his statement that such a claim existed. "He did have good title except for this claim that the government had on it," was

this witness' summary of Winans' contention (R. 1034). Attorney Abraham, as we have just pointed out, testified that Winans' statement to him indicated that the defect was "more technical than real."

Even the map on the ranger station had this particular 40 acres merely marked "Title not Clear" (R. 2184); and the two forest rangers testified that it was only this information that they conveyed to Stegmann and Parker. The Metsker map which Parker had in his car and which he consulted, the title company also using one (R. 194, 199), had the property designated "W. R. Winans" (R. 2213). W: R. Winans was the father of appellees Winans, and former owner.

It is not a case such as, for instance, an applicant knowing that there is a recorded deed or mortgage which the title company has missed. Probably very few lawyers cognizant of the general rules regarding school lands would, upon examination of the abstract in evidence (Ex. 6, 315; R. 1899, 2266-8), have failed to pass the title (and, in fact, title was apparently approved in 1938 and 1946 by an attorney for a mortgagee (R. 1718-21)), even though advised that some government employee had asserted that the government claimed the property.

The title company itself, with all its expert knowledge, after months of contemplating the legal aspects of the title, refused to take a positive stand.

For at the first conference between the Title Company's representatives and Parkers' lawyers, a plan was at first discussed of bringing proceedings to clear the

title; and this plan was abandoned only because of the time factor involved (R. 1842). And almost two months later the title company's attorneys wrote Parkers' attorneys that, "In the absence of any other evidence to the contrary, you are apparently correct in your assertion . . . that the legal title . . . is vested in the United States of America subject to whatever estoppel the parties holding under the deed from the State of Oregon may have a right to assert against the government" (R. 1921). Its original complaint, filed November 27, 1951, in which the United States was named as a party defendant (R. 2241-52), at no place states that the government owned the property. The prayer asks for a decree: "Determining and quieting the title to the said Lot 2, in the party or parties rightfully entitled thereto." Over a year later, December 29, 1952, the amended complaint, with its inconsistent and contradictory allegations, asks in the prayer for a decree declaring that the title policies do not insure against loss sustained "on account of any defect in or unmarketability of the title to Lot 2"; and also "Declaring what estate, title or interest in Lot 2 was conveyed to Chet L. Parker under the conveyance set forth in Exhibit B", and determining what loss or damage "was sustained by Parkers as a result of said defect in or unmarketability of the title to Lot 2" (Sub. 2, 7, 8; R. 22-3).

(2) But the fact that the point of law involved was obscure does not excuse the title company. The facts upon which the claim of the government was based were all matters of public record within the State of Oregon, admittedly available to it (F. 40, R. 139). The legal con-

clusion that because of those facts the government retained title, is set forth in the opinion of the Supreme Court of the United States, *United States v. Morrison,* 240 U.S. 192. Moreover, the "right, title and interest" obligation of the Winans as set forth in the option (R. 31)—that very cleverly worded document—while meaningless to a layman, should have been a red flag to the title company, whose experts, as already stated, examined it on August 29, 1951, before issuing a policy. Accordingly, there is no question but that, as the trial court found, this defect "could have been discovered by plaintiff by a proper examination of the statutes and records, all of which were available to it, and its failure to discover this defect of title was negligence on its part" (F. 40, R. 139). But the particular person in the Portland office of the Title Company to whom this matter was referred (R. 182-3) advised the Hood River manager that further search of public records was unnecessary, because, as the manager noted:

> "All sections 16 & 32 through S/O set aside by act of congress to S/O as school lands. Nothing further needed" (Ex. 3, R. 1880).

Besides, the company largely relied on the copy of the other Title Policy which it had (R. 194, 199-200) and upon which the other company had paid, because of this very defect.

(3) An uneducated layman—he went to the ninth grade in school (R. 1360)—hired the expert on real property titles to advise him with regard to this title and now he is told that he cannot collect upon the insurance which he later bought from the expert because,

forsooth, it is said that other laymen told him that the title was questionable, and that he should have believed them and not the expert he hired to advise him.

Failure to Disclose Information not Actionable Fraud.

Even assuming that the Parkers had the information above referred to (which is emphatically denied by them) it seems to us that the law is clear, particularly in Oregon, that there was no duty on their part to advise the Title Company of such information. To us it would seem ridiculous for a logger ordering a title report, or a title policy, to state to the company that he understood the title was "questionable" or "not clear." The very purpose of going to the title company is to learn from an expert whether the title is clear and unquestionable.

Bearing in mind that, as is admitted and the court found (F. 32, R. 135), no affirmative representations of any kind were made, the very first element of actionable fraud is absent.

It should also be borne in mind that by a long line of cases in Oregon, as well as elsewhere, fraud is never presumed, and must be established by clear, strong, satisfactory and convincing evidence. The Oregon authorities are reviewed in *Metropolitan Casualty Insurance Co. v. Lesher,* 152 Or. 161, 167-73, 52 P. 2d 1133, 1136-8.

But more important, it is also the law in Oregon, as elsewhere, that where individuals are dealing at arm's

length they must look out for themselves, and mere silence is not fraud.

In *Frederick v. Sherman,* 89 Or. 187, 173 P. 575, plaintiffs had recovered a verdict and judgment on an alleged fraud action in which they claimed they were defrauded in the purchase of an exclusive right to sell certain patented automobile tires. The complaint alleged, and the evidence established, that the manufacturer of the tires was "wholly insolvent and bankrupt" and that defendant had known this. Accordingly the court, as it stated, was "called upon to say whether the allegations of the complaint in regard to fraudulent concealment of facts, states a cause of actionable fraud." (89 Or. at 190, 173 P. at 576.) The court held that it did not. It quoted with approval from Story on Contracts (5th ed.), sec. 517:

> "Thus, it is the general policy of the law, in order to induce vigilance and caution, and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistakes."

The court also quoted from Bigelow on Fraud, p. 590, in which that eminent author discussed whether "pure silence" could be fraud, as follows:

> "But speaking of pure silence, the general rule stated is very strong. It governs, even though the silence was meditated, and with knowledge that the opposite party was laboring under mistake or ignorance."

The above Oregon case has been referred to as one which holds "that even meditated silence may not be fraudulent." *McGinn v. McGinn,* 50 R.I. 236, 146 Atl. 636, 638.

There are, of course, exceptional circumstances where a duty to disclose facts exists. Generally speaking, these fall into three caterogies: (a) where a fiduciary or confidential relationship exists; (b) where one has created a wrong impression by some artifice, such as speaking half-truths where "the opposite party . . . has not equal means of knowledge," e.g., *Palmiter v. Hackett,* 95 Or. 12, 17-8, 185 P. 1105, 1106, 186 P. 581; and (c) in case of sales of property where the seller knows of facts, not available to the buyer, which destroy the value of property sold. *Clearwater v. Forrest,* 72 Or. 312, 143 P. 998 (sale of animals with a latent disease); *Musgrave v. Lucas,* 193 Or. 401, 238 P. 2d 780 (sale of sand and gravel business and gravel bar on navigable river, seller failing to disclose that he had been threatened with litigation by Federal Government if sand or gravel were removed.). But with the above exceptions, "fraudulent concealment" consists only of some "affirmative act likely to prevent or intended to prevent knowledge of a fact." Restatement of Contracts, sec. 471, comment "f"; 23 Am. Jur., Fraud and Deceit, sec. 77, pp. 853-4.

Necessity of Reliance by Representee on Representor's Statement or Conduct.

But the Title Company should be denied recovery not only because there was no duty on the part of the Parkers to advise it of the information which it is claimed they had with respect to a possible defect, but also because it was not justified in relying upon the Parkers for any such information, nor did it so rely. This is, of course, basic in the law of fraud.

Certainly there cannot be said to be reliance upon the representations (or upon silence) if the representee makes his own independent investigation; and much clearer is it that there is no right of reliance if the investigation was undertaken, as here, at the request of the representor. The general law on the subject is set forth in 37 C.J.S., Fraud, sec. 37, pp. 284-6, as follows:

> "One cannot secure redress for fraud where he acted in reliance on his own knowledge or judgment *based on independent investigation.* This rule is especially applicable where the representee's investigation was undertaken *at the suggestion of the representor.* If it is established that the representee relied on his own judgment and not on the representor's statements, he cannot recover, *even though he was genuinely deceived* by the representations and his investigation was of an incomplete or ineffectual character.
>
> "Obviously there can be no recovery if the investigation revealed the true facts so that if the representee was deceived at all he in effect deceived himself. Where the representee undertakes an independent investigation he is *ordinarily chargeable with knowledge of all the facts which such an investigation should disclose,* and has no right to rely on the representor's statements.
>
> "There is authority holding that, even though no investigation was actually made, the fact that one was agreed on will preclude the right to rely on representations. Similarly there can be no recovery for representations, where the representee acted solely on the reports or advice of third persons, as where he relied on information from his own agents, the advice of counsel, *the report of a title company,* or the valuation of appraisers." (Italics added)

The above rule of law is often applied in cases of sales of property, where the purchaser makes his in-

dependent investigation. This type of case was before the Oregon court in *Ziegler v. Stinson,* 111 Or. 243, 224 P. 641. There the court, after laying down the general rules of fraud, including reliance upon the representations by the purchaser proceeded as follows (111 Or. at 252, 224 P. at 644):

> "It is held in this jurisdiction that the rule of *caveat emptor* applies 'where a party alleged to have been deceived by the false representations of his adversary has full means of knowing the truth, and has acted in the transaction on his own judgment.' *David v. Moore,* 46 Or. 148 (79 Pac. 415); *Wimer v. Smith,* 22 Or. 469 (30 Pac. 416); *Cawston v. Sturgis,* 29 Or. 331 (43 Pac. 656)."

To the same effect are *Slaughter's Administrator v. Gerson,* 13 Wal. (U.S.) 379, and *Farnsworth v. Duffner,* 142 U.S. 43, 35 L. Ed. 931.

Not only is the representee barred from recovery when he makes an independent investigation, but even though he makes no such investigation he cannot recover if he has equal or greater means of acquiring information than the representator, since in such a case reliance upon the representation is not justified. The following quotation from a decision of the United States Supreme Court has been quoted three times with approval by the Oregon Supreme Court:

> "When the means of knowledge are open and at hand or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor." *Shappiro v. Goldberg,* 192 U.S. 232, 241-2, quoted with approval in

Linebaugh v. Portland Mtg. Co., 116 Or. 1, 15-6, 239 P. 196, 201; *Fairbanks v. Johnson,* 117 Or. 362, 368, 243 P. 1114, 1116; *Crouch v. Butler,* 119 Or. 344, 349, 248 P. 849, 850.

A good illustration of this rule is *Palmberg v. City of Astoria,* 112 Or. 353, 383-6, 228 P. 107, 229 P. 380, 382-3, where plaintiff claimed that he entered into a contract for excavation work upon false representations of city officials as to the quantity to be excavated, but was denied recovery because the actual figures could have been obtained from the plans and specifications.

Another Oregon case, being, like the present one, a so-called "conspiracy to defraud," is *Gabriel v. Collier,* 146 Or. 247, 29 P. 2d 1025. The object of the conspiracy was said to be to deprive plaintiffs of real property, among other means through connivance with a receiver in failing to protect it against foreclosure. In furtherance thereof it was charged that "defendants persistently kept plaintiffs in ignorance of what was transpiring" (146 Or. at 250). The court's answer was short and to the point: "Everything that was done was a matter of record and plaintiffs could easily inform themselves. Defendants were under no obligation to furnish plaintiffs any further information" (146 Or. at 258, 29 P. 2d at 1029).

Another good illustration is *Weir v. School District,* 200 Wn. 172, 93 P. 2d 308, 123 A.L.R. 1057, where a school principal in negotiating for an increase in salary stated that he had interviewed the county superintendent and had learned from him that the school's budget was sufficient to pay him the salary he requested. The direc-

tors granted the increase, but later on learning that the statement was false, attempted to rescind. The court held that, since the actual facts were available to them, the directors could not avoid the contract even though this representation was false and relied upon.

"We are aware," the Washington Supreme Court said in the above case (93 P. 2d at 311), "that the tendency of the modern decisions is to restrict rather than to extend the rule requiring diligence on the part of the injured party and similar rules such as *caveat emptor.*" The opinion thereupon cited illustrations of this modern tendency, and then continued:

> "But in these later cases it is to be noted that there was a false assertion of an existing fact usually with reference to property, the truth of which fact was peculiarly within the knowledge or means of knowledge of the declarant; or the property was at a distance and the opportunity of ascertaining the true fact was not readily at hand; or the misrepresentation was made for the purpose of preventing an investigation and ascertainment of the true fact; or the declarant knew that the other party did not intend to make a personal investigation, but relied solely on the truth of the fact communicated by the declarant."

To the same effect is *Goess v. Ehret,* 85 F. 2d 109 (2nd Cir.), in which a bank director contended he was induced to purchase stock in the bank by misrepresentations of its President concerning its financial condition. The court held this was no defense, Judge Learned Hand stating that the director "was never wronged at all" since in effect he accepted the President's word "as a substitute for the discharge of his own duties."

Another decision often referred to is that of the Supreme Court of the United States in *Andrus v. St. Louis, etc., Refining Co.*, 130 U.S. 643, 32 L. Ed. 1054, in which a purchaser of land claimed he was misled by false representations of officers of the seller that they had obtained releases of claims to the land by other persons in possession, but relief was denied because the purchaser did not inquire of the persons in possession thus referred to. Professor Williston has pointed out the influence of this decision, in these words:

> "Nevertheless, the fact that the Supreme Court of the United States has stated that 'the law does not afford relief to one who suffers by not using the ordinary means of information whether his neglect be attributable to indifference or credulity' continues to be influential in leading courts often to reach their conclusions by deciding whether reliance was justified, rather than whether there was reliance in fact on misrepresentations intended to induce that reliance." 5 Williston on Contracts, Rev. Ed., sec. 1516, p. 4232.

Cases similar to the above but probably closer on their facts to the one here involved are those in which a grantor is given false information regarding the state of his title but before selling engages an attorney to investigate and receives similar erroneous information. He is denied relief because he is deemed to have acted in reliance upon the attorney's opinion, not the purchaser's false representations. The decisions are collected in an annotation in 136 A.L.R. 1299, at 1303, as follows:

> Saltonstall v. Gordan, 33 Ala. 149.
> Woodrow v. Riverside Greyhound Club, 192 Ark. 770, 94 S.W. (2d) 701.
> Cobb v. Wright, 43 Minn. 83, 44 N.W. 662.

In the present case, there was not the slightest hint in the testimony of any officer or employee of the Title Company of reliance upon anything except their own investigation. In fact, not only did the Title Company rely upon its own investigation but the Parkers themselves relied upon the Title Company, not only in paying the premium but in paying the purchase money. And the actual facts in the present case are not only that the defect "could have been discovered by plaintiff [Title Company] by a proper examination of the statutes and records, all of which were available to it" but "its failure to discover this defect of title was negligence on its part" (F. 40, R. 139).

Insurance Cases—Generally.

Anciently there was a rule in marine insurance law that the applicant must disclose to the underwriter all material circumstances within his knowledge which could affect the risk. But as Judge Swan pointed out in *Hare & Case v. National Surety Co.,* 60 F 2d 909 at 911 (2nd Cir.), citing Lord Mansfield's opinion in *Carter v. Boehm,* 3 Burr, 1905, the reason underlying this rule was that "since the special facts upon which the contingent chance is to be computed most commonly lie in the knowledge of the insured only, the underwriter proceeds upon confidence that he does not hold back any known fact affecting the risk, and is deceived if such a fact is concealed, even though its suppression should happen through mistake and without fraudulent intention."

As Judge Swan proceeded to explain, this principle has been relaxed in the case of various types of insurance other than marine "because of the practice of insurers to make inspections or ask questions which may reasonably be supposed by the insured to produce whatever information the insurer wants."

Even in the case of marine insurance the rule has been greatly relaxed because, as a leading authority points out, "it must be presumed that the insurer has in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." Vance on Insurance (3d ed.), sec. 61, p. 375, quoting from *Clark v. Insurance Company,* 8 How. (U.S.) 235, 249.

And so it is now the law of insurance generally, including even marine insurance, that there is no obligation on an insured to disclose matters which are either known to the underwriter or which are equally within his reach and which by due diligence he may discover. Vance on Insurance (3d ed.), sec. 64, p. 381; 45 C.J.S., Insurance, sec. 645, p. 549.

In fire insurance policies it is common to insert a provision that the policy shall be void "if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or condition concerning the insurance." But, even here, more than failure to disclose a known fact is required to avoid the policy. This is manifest from the decision in *Arthur v. Palatine Insurance Co.,* 35 Or. 27,

29-30, 57 P. 62, 63. There Mr. Justice Robert S. Bean, in giving the opinion of the court, said:

> "The policy was issued upon an oral application . . . and no statements or representations whatever were made in reference thereto by the assured or anyone in their behalf. In such case the intention of the assured becomes of controlling importance, and, in order to avoid the policy, it must appear, not only that the matter concerning which the insurer had no information was material to the risk, but that it was intentionally and fraudulently concealed by the assured . . . But the mere failure or neglect to make known, without inquiry, facts which the insurer may regard as material to the risk, is not a breach of the provision of the policy above quoted, because the assured has the right to assume that the insurer will make proper inquiry in reference to such matters as it may deem material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to unusual or extraordinary circumstances within the knowledge of the assured but of which there is nothing to put the insurer upon inquiry."

Title Insurance Cases.

In applying the above rules of actionable fraud to cases involving title policies, it is important to bear in mind the nature and purpose of title insurance.

As we have already endeavored to stress, the business of examining titles to real property is a business for experts. The New York Court of Appeals said, in a case which we consider to be of importance here:

> "To a layman, a search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown. To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even

after it has been obtained, is the very purpose for which the owner seeks insurance." *Empire Development Co. v. Title Guarantee & Trust Co.,* 225 N.Y. 53, 121 N.E. 468, 470.

The "professional advice" referred to by the New York Court not only advises the prospective purchaser whether there was a "flaw in the title," whether it is "questionable" or "not clear." This is not what the purchaser wants, at least not all he wants. If the search shows something wrong, he wants assurance that he will not suffer as a result. And so the New York court held in the above case that the fact that the purchaser knew of the defect in the title at the time of the purchase—in fact, in that case, he had contracted to take it subject to liens—was immaterial.

For their purpose in obtaining the insurance was to have indemnity against the *results* thereof. The lien, the court said, "might be vacated or reduced. The proceedings might be without jurisdiction or void. Against the payment of these liens, they had the right to secure themselves." As the court said, "mere knowledge of a defect by the insuring owner would not constitute a defense. A title insurance policy is much in the nature of a covenant of warranty or a covenant against incumbrances. Here we have held that knowledge is immaterial. We see no reason for applying a different rule as to such policy."

Other courts also—perhaps influenced by the language of the policies, as in our present case, that the company insures "against loss or damage which the in-

sured may sustain by reason of any defect"—have held that knowledge by the insured of defects in the title is no defense. Among these cases are *Maggio v. Abstract Title & Mortgage Corporation,* 98 N.Y.S. 2d 1011 (App. Div.), in which distinctions between a "guaranteed title search" and "title insurance" are discussed; *Alabama Title & Trust Co. v. Millsap,* 71 F. 2d 518 (C.C.A. 5th) holding that notice of a defect does not bar recovery even though the policy requires that the insured be a "purchaser for value": *First Carolina Bank v. New York Title & Mortgage Co.,* 172 S.C. 435, 174 S.E. 402, 404, holding that knowledge of agent of insured of a defect of title was immaterial since the insurance company relied upon the investigation by its own agents; and *Jones v. Southern Surety Co.,* 210 Ia. 61, 230 N.W. 381, 385, protecting a purchaser who purchased from a known incompetent person, he not being guilty of misrepresentation or concealment in his application.

Many title companies, no doubt influenced by decisions such as the above, have expressly provided in their policies that among the defects excepted from the coverage are those of which the purchaser had notice and failed to disclose, or to the creation of which he was a party, and similar provisions. Thus, a form in use in California excepts "defects, liens or encumbrances . . . created or suffered by the insured, or known to the insured to exist at the date hereof and not disclosed in writing to the company." (*Vernon v. Title Guarantee & Trust Co.,* 7 Cal. App. 2d 171, 46 P. 2d 191); and a form in use in Massachusetts has provided that the insured's "failure to disclose any known liens upon, or

adverse claims to the estate . . . shall avoid this policy." (*Clarke v. Massachusetts Title Insurance Co.,* 237 Mass. 155, 129 N.E. 376); and, in Illinois, "rights or claims not shown of record at the date of this policy if known to the party guaranteed." (*Taussig v. Chicago Title & Trust Co.,* 171 F. 2d 553, 555 (C.A. 7th).

But in the present case, as we hope the court will bear in mind, the facts are that (1) the title policy (R. 41-8) has no such exceptions, (2) even if appellee's evidence be taken at face value, the insured had no knowledge of the precise defect, but only that the title was "questionable" or that a third party i.e., the United States,—whose own records disclosed only that the Winans' title was "not clear,"— claimed the property, and (3) the actual state of the title was a matter of public record, available to the title company.

Up to this point we have been discussing cases where a person says nothing, refrains from calling attention to something which a party with whom he is dealing might consider important. The findings, however, state certain affirmative conduct by Parker (R. 136-8). This, it is said, was pursuant to a "conspiracy," and we shall discuss that conduct after a discussion of the charge of conspiracy.

3. Re. The Alleged Conspiracy

At no place in either the original complaint (R. 2241-52) or in the amended complaint (R. 3-24), is there any suggestion of a conspiracy. Whether plaintiff's attorneys obtained this idea during the trial upon learning what

appeared to be rather pronounced views of the trial judge in opposition to their theory that there was a duty on the part of Parker to disclose facts which they claim he knew (R. 158-64), or whether they got the idea from the judge's opinion, we do not know.

Legal Effect of alleged conspiracy.

Nor do we regard it as important. It is very clear that the charge of "conspiracy" adds nothing to the case. It's only effect, if any, would be to charge Stegmann with Parker's alleged defaults. For it is well settled, certainly in Oregon, that in historical tort actions, such as slander, malicious prosecution or fraud, the only function of the charge of conspiracy is to connect each of the defendants with the wrongdoings of the other, nothing more. In Oregon, this was definitely established in the case of *Gabriel v. Collier,* 146 Or. 247, 29 P. 2d 1025, already referred to. In that case, as here, it was claimed that there was a conspiracy to defraud, but with respect to this the court said (146 Or. at 255, 29 P. 2d at 1028):

> "The allegation of conspiracy, if sustained: 'Only being important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, without which he would not be implicated.' "

The Oregon court credited the above quotation to the New York opinion in *Green v. Davies,* 182 N.Y. 499, 75 N.E. 536, 3 Ann. Cas. 310, a leading case on this subject. Actually, however, it originated in an earlier New York case, *Brackett v. Griswold,* 112 N.Y. 454, 20 N.E. 376, and was quoted in the Green case. Other por-

tions of that quotation, omitted in the Oregon opinion above referred to, are (75 N.E. at 537):

> "The gravamen is fraud and damage, and not the conspiracy . . . But a mere conspiracy to commit a fraud is never of itself a cause of action and an allegation of conspiracy may be wholly disregarded. . . . "

Other Oregon decisions to the same effect are *Teller v. Commercial Credit Co.,* 149 Or. 372, 375-6, 40 P. 2d 1018, 1019, an alleged conspiracy to injure credit by refusing to honor checks; and *Strycker v. Levell,* 183 Or. 59, 68, 190 P. 2d 922, 926, an alleged conspiracy to libel the plaintiff. In this latter case, plaintiff tried to avoid the defense of privilege by calling it a conspiracy, but as the court said: "The plaintiff cannot avoid the defense of privilege which appears in her own complaint by giving to a libel suit the name of an action on the case for conspiracy.

Evidence of Alleged Conspiracy.

We may be mistaken in our assumption that what we are going to talk about now was, or will be, claimed by plaintiff's counsel to be evidence of the alleged conspiracy. However, whatever its purpose might have been, about which we have been left in the dark, it was considerably emphasized by counsel and apparently was influential with the court—although much of it seemed by the court to be unimportant when introduced—so we feel that it must be discussed, and we do so now. This large volume of evidence, all of which it seems to us was clearly inadmissible as *res inter alia acta,* may

roughly be divided into (1) other transactions between Parker and Stegmann, no third parties being involved, and (2) other transactions between one or both and third parties.

Former Transactions Between Parker and Stegmann.

The court's opinion points out that Parker contended that Stegmann was not his agent when he purchased the option from Winans and then says, "This is a fantastic story" (R. 109). The opinion says the story starts "with an alleged one year 4% loan by the Parkers to Stegmann of $22,000, delivered to him in currency, and secured by an unrecorded chattel mortgage on old equipment worth considerably less than the amount of the loan." The court must have overlooked the fact that this "fantastic story" of a loan which took place November 20, 1950, nine months before the option was given, was not related by Parker, nor by Stegmann, in proof of the non-existance of an agency. It was not, in fact, related by either of them in proof of anything. It was not part of the Parkers' case. They told about it because they were required by adverse counsel to do so, first, in depositions (R. 1972-80, 2032), and, second, at the trial (R. 380-92, 400-2, 583-93). This story of a loan transaction between two uneducated loggers and their manner of handling it *inter se,* may or may not be fantastic, depending upon the point of view, but it has never been put forth by Parker, nor for that matter by Stegmann, as proving anything in this case. It doesn't prove anything.

The same may be said of Stegmann's "equally fantastic" explanation of how he used this money; and also of the "equally vague and improbable" (R. 110) testimony of another loan in May, 1951, of $10,000.00 (R. 408-16, 588-92, 624-5), and another of approximately $6,000.00 to build a road (R. 428-9, 483, 639-43). All this testimony, as stated, was not offered by Parker, nor by Stegmann. None of it has anything to do with this case.

Transactions with Third Persons.

Other events and transactions, concerning which a plethora of testimony burdens the record, but having no relevancy to the present lawsuit, much of which we felt was being admitted with great reluctance by the court, include the following: (1) The Murphy-Nelson-Rutherford transaction under which a Mr. Rutherford took over logging operations under an arrangement whereby Parker was to be paid money owed him by Stegmann (527-31, Ex. 34, R. 2090-6); (2) the purchase of the Johnson timber by the Parkers and the sale thereof to McCormick Lumber Company, Stegmann being paid a "finder's fee" (R. 591-3, 658-9, 1205-7); (3) the truck-tractor accident, involving a truck and tractor belonging to Stegmann, on which Parker and a Mr. Heider, a lawyer, had successive mortgages, which was wrecked, and the salvage purchased by Parker from an insurance company (R. 453-7, 633-9, 643-5, 1481; Ex. 77-82; R. 2187-99); (4) purchases by Stegmann of timber from others—Johnson (660), Walter (693-4; Ex. 30; R. 2085-6), Kaltenberg (696), and others; (5) the "jeep"

deal whereby Parker traded in a jeep to an automobile dealer on another jeep which he was purchasing, Stegmann being involved because, for a time, he was going to purchase Parker's jeep, but didn't, resulting, so it was claimed, in the dealer being "gypped"—whether of $50 or $300 is not clear (R. 1173-83, 1368-9, 1415-9); (6) the Ellis matter, in which Stegmann owned a truck, subject to a repair bill to Willamina Garage and also to a mortgage in favor of attorney Heider (who was sometimes attorney for Parker). Parkers paid off Heider, obtained a transfer of title from Stegmann and by a replevin action obtained the truck (R. 392-3, 449-50, 755-6, 763-4, 1139-48, 1410-3, 1431-3, 1484-92; Ex. 86; R. 2186); (7) the Wardell matter. We understood that this was never actually admitted in evidence (R. 1189, 1197-8), but appellees have included it in the record. Apparently, somebody was confused regarding the location of timber on which Parker gave an option. Later, it was discovered that somebody had moved a quarter corner marker, but there was no evidence establishing that Parker had anything to do with that (R. 1184-1205, 1208-19, 1571-2).

The above is the type of evidence—comprising a large portion of the record—which was offered either to show that Stegmann was an agent or that the parties were conspirators, or perhaps for other purposes. It was obviously all inadmissible. The only suggestion in the record of a possible basis of admissibility was a suggestion that it showed "intent" (R. 1189, 1249).

Evidence of Extraneous Transactions Was Clearly Irrelevant and Inadmissible.

It seems to us that under no theory whatever could the evidence of these various transactions, some taking place long before the one here involved, be admissible for any purpose. On several occasions we objected to the testimony (R. 1008, 1023, 1066, 1162, 1189, 1242-3, 1246-9), and the court noted our objections. At one point, upon our repeated objection of evidence of conversations and transactions when Parker was not present, the Court said, "You do not have to make that objection anymore, Mr. Jaureguy, I will assume that you make it" (R. 1066). Sometimes the Court stated that the evidence was being admitted provisionally (e.g., 1189), subject to being connected up, but on two occasions intimated that it might be admissible to prove "intent" (R. 1189, 1249).

To the general rule that in order to prove a wrongful act, evidence of other acts and transactions are not admissible, there are, of course, well-recognized exceptions, applicable in both criminal and civil cases. The leading case in Oregon is *State v. O'Donnell,* 36 Or. 222, 61 P. 892, where five exceptions are set forth.

But whether the evidence was offered for the purpose of proving intent, or motive, or anything else, the authorities are uniform that, in addition to other well-defined requirements, the evidence offered must be of some act or transaction which is in some way related, or at least similar (and in such case only to prove knowledge), to the particular transaction involved.

The following are illustrations: *Boord v. Kaylor,* 100 Or. 366, 376-7, 197 P. 296, 299-300 (Evidence rejected as simply "an attempt to show that because a jury had found that he made false representations to Mrs. Cline it was therefore probable that he had been guilty of like representations in the present instance."); *State v. Willson,* 113 Or. 450, 459-98, 230 P. 810, 233 P. 259-272, on rehearing (Reviewing many previous decisions. In prosecution for unlawful abortion, the Court held that evidence of prior abortions inadmissible since there was "nothing in the testimony to show that the several alleged abortions constituted an inseparable transaction," 113 Or. at 467, 233 P. at 262); *Union Central Life Insurance Company v. Kerron,* 128 Or. 70, 79-80, 264 P. 453, 456-7 (To prove fraudulent representations of mortgagee regarding commissions and other charges, the trial court had admitted evidence of similar fraudulent representations to others which was offered to prove "knowledge and a fraudulent system practiced by plaintiff agent." The court in affirming, noted that such evidence is admissible when it consists of "fradulent acts similar to those charged, and done at or near the same time"); *Terry v. United States,* 7 F. 2d 28, 30 (9th Circ. Cal.). (Conviction for conspiracy to violate National Prohibition Act reversed because of admission of evidence that defendant earlier participated in another, but similar, conspiracy); *Crowley v. United States,* 8 F. 2d 118, 119 (9th Circ. Cal.). (Same as preceding case except that inadmissible evidence was of arrest of defendant and seizure of liquor in his possession seven months prior to the alleged conspiracy); *Tedesco v. United*

States, 118 F. 2d 737, 739-40 (9th Circ. Or.) (In prosecution for violation of Mann Act, evidence that defendant took another woman to same house of prostitution to work there held admissible to prove knowledge and intent, as against contention that prior act was not sufficiently "similar"); *Weiss v. United States,* 122 F. 2d 675, 684-5 (5th Circ. La.) (Holding that the rule in fraud cases is the same in civil as in criminal cases, citing *Wood v. United States,* 16 Pet. 342, 10 L. Ed. 987); 2 Wigmore on Evidence, 3rd. ed., sec. 302.

And if the purpose of the evidence was to prove that Stegmann was an agent of Parker, there is likewise an insuperable objection to its being considered as such. For agency cannot be proven by acts or declarations of an alleged agent, unless the alleged principal has acquiesced in the claim of agency. *Bartnik v. Mutual Life Insurance Co.,* 154 Or. 446, 448, 60 P. 2d 943 944; *Hitchman v. Bush,* 195 Or. 640, 642, 247 P. 2d 211, 212. Nor can agency even be proven by acts of the agent *plus* his declarations that the acts are pursuant to an agency. *First National Bank of Prineville v. Conroy,* 127 Or. 302, 307, 272 P. 271, 273.

Alleged Acts of Parkers Claimed to be Attempts to Defraud Plaintiff Pursuant to Conspiracy.

The findings, as we already have explained (supra, 4-5), state that the alleged conspiracy was formed on or about August 16, 1951, after defendants Parker and Stegmann are said to have learned of the alleged defect and also "that plaintiff had not discovered the defect of

title," that is, after Parker obtained the title report showing title free from the claim of the United States.

The Court's opinion makes it rather clear that there were two items of evidence, particularly, which persuaded the Court to find against the Parkers' contentions in practically every instance where there was contradictory evidence, and to conclude that the issuance of the policies was the result of a conspiracy and of fraud (R. 108-9). Although, as we shall presently attempt to demonstrate, the evidence is clear that there was neither conspiracy nor fraud but that the Title Company's error was entirely its own fault, we pause here to mention these two instances.

The first of these (R. 108) was the alleged incident testified to by two forest service employees that Parker and Stegmann went to the Parkdale Ranger Station on the evening of August 13, being later on the same day that Parker ordered the title report, and there examined the records concerning the Winans property and were told "that the title to this property was in doubt." We already have pointed out (supra, 16-7) that it was seventeen months later before the two forest rangers were called upon to identify these two men, and that Parker vigorously denied that he was there at that time and Stegmann testified that he might have been there, but not with Parker.

The Court's opinion (R. 108) then says that "Even more significant is the date of August 18, 1951." This is the evening that, admittedly, Stegmann exercised the option, giving a check of $4,000 as the option required.

Stegmann (R. 718, 1532-40) and Parker testified that shortly thereafter Parker arrived and Parker testified to a later conversation with Winans during which Winans attempted to find the title policy issued to his sister, saying nothing of the former settlement with the title company, and they had a general conversation (R 264-6, 275-86, 344-51). That Parker was there that evening was corroborated not only by Stegmann, but by his brother (R. 1250-2, 1259-61, 1265-6).

On the other hand, as the court's opinion points out (R. 108-9), Winans denied there was any such meeting and was corroborated by two employees of the Army Engineers. But the extent of the testimony of these two engineers was only that they waited outside Winans' office while Stegmann transacted some business within the office, that they then went into Winans' office and obtained checks in payment of services, and believed that when they left the office, they didn't see Stegmann or his brother there, nor Parker (R. 1041-4, 1663-4).

However, not only was this seventeen months after the date of the incident testifed to, but while one of these two witnesses testified that only Stegmann and Winans were in his office while they waited outside (R. 1662-3) the other one testifed that "we were waiting outside while Mr. Stegmann and this other man with him were in a conference with Mr. Winans in his office" (1038); when they left it was getting dusk, about 8:00 o'clock (R. 1664) and neither of them was really at all certain that the others had gone at that time—"No, I don't believe they were there. Never saw them (R. 1664).

What to us is even more important is the entire absence of motive for Parker or Stegmann to testify falsely regarding the events of that evening, as it is claimed they did. It is claimed that Parker tried to conceal from Winans the fact that he was an undisclosed principal in the transaction (F. 38; R. 138) and one of the principal contentions is that Parker learned from Winans about the claim of the government. If there had been any motive to deceive on the part of Parker as to whether at this or any other particular time he was with Winans, the motive would be to claim that he was not.

The testimony of the various witnesses regarding the above controversy as to whether Parker was with Winans the evening of August 18 is set forth in Appendix B.

Object of Alleged Conspiracy.

The findings say that the conspiracy was one "to defraud the plaintiff by inducing the plaintiff to issue to defendants Parker a policy of title insurance on said property in an amount greater than its actual value and to collect the amount of such insurance from the plaintiff on account of the failure of title to Lot 2" (F. 35; R. 136).

Each of the title policies, that is, the purchaser's policy and the owner's policy, was in the amount of $125,000. As is the custom with title companies in Oregon, there was no attempt to segregate these values in either policy as between Lot 1 and Lot 2.

The option was for $100,000.00 and the Parkers testified, although the trial judge said he did not believe

them (R. 111-2), that they paid $25,000.00 for the option. This would total $125,000.00; and, apparently, Parker merely added the two sums together and deducted a $4,750.00 refund, and in later negotiations with the Title Company advised the company that the actual net amount paid was $120,250.00. Of course, the amount paid for property is only one item of evidence of value.

In purchasing insurance on property the aim, as almost everyone knows, should be to set the amount at a sum which will indemnify the insured against any possible loss. The loss will depend not upon the cost of the property, but upon its value at the time of the loss. There is certainly no rule of law or morals that says that a purchaser of property should not obtain title insurance in an amount greater than the purchase price of the property insured.

At the time that the findings say the above conspiracy was formed, that is, on August 16, 1951, the title report had been obtained but the purchaser's policy had not been ordered, nor had there been any representations to the Title Company respecting the value of the property. (However, the Title Company's agent testified that Parker had advised that the value of the property was approximately $50,000.00 R. 194.) The title policy, as we have pointed out, was ordered on August 30, just one day after the Title Company had seen the option with its designated price of $100,000.00 (supra, 14-5). This was also ten days after the meeting with the board of directors of Multnomah Plywood Corporation where the tentative deal for a sale at $180,-000.00 was discussed (supra, 13-4), and six days after the

meeting in the office of the attorney for the Plywood Company at which he was directed to draft the contract for a sale at that price (supra, 14). Insofar as the amount of the policy was concerned, the mistake, therefore, was in not designating $180,000.00 instead of the $125,000.00 that was specified.

Although the objective of the alleged conspiracy is said to have been to obtain a title policy "in an amount greater than its actual value," there is no finding as to what the actual value was. There is a finding that defendants Winans had placed a valuation of $80,000.00 on Lot 1 alone (F. 16 and 36; R. 125, 137). Plaintiff's own evidence, however, is that the timber on both lots was worth only $45,172.00 (Ex. 19; R. 1088-97, 1932-5). The evidence is that the timber on Lot 2, being the lot with the defect in title, had a value of approximately twice that on Lot 1 (R. 1303-4, 1933-4), so that if Winans' valuation was correct, the value of both lots was $240,000.00—not the $180,000.00 for which Parkers believed they were to sell it to Multnomah Plywood.

It was this very sale to Multnomah, it will be recalled, that caused Parker to order the purchaser's policy (supra, 14-5). Further, as we have pointed out, two witnesses, both of whom had acted on behalf of Multnomah Plywood, gave it as their opinion at the trial that the property was worth the $180,000.00 which the Multnomah directors had proposed to pay for it (R. 1297-1306, 1330-4).

Of course, the amount which the insured in a title policy may recover in event of loss is not fixed either

by the original cost, or by the face of the policy or by the insured's own estimate of value, or by the actual value at the time the policy is issued. The amount to be recovered depends upon the actual value of the property at the time of the loss, not exceeding the amount of the policy.

Alleged Acts Pursuant to Conspiracy.

The findings further state that "pursuant to said conspiracy" Parker represented to plaintiff that the assignment from Stegmann was the basis of his interest in the property, that he had purchased the option for $25,000.00, that the value of Lot 1 was $35,000.00 and the value of Lot 2 was $90,000.00. It says that all these representations were false, and the assignment of the option "was a sham" (F. 36; R. 136-7).

We are still entirely in the dark as to what reason the Title Company claims any of the above could possibly have induced it to refrain from making an adequate and full search of all records bearing upon the title. If we are to assume, as apparently we must, that sometimes Appellee Company made a careful title search and sometimes its work was indifferent and sloppy, one should think that the larger the policy, the more careful the search.

But if we should accept the hypothesis that there was an exaggeration of value upon which the Title Company relied to its detriment, we again call attention to the facts (see supra, 14, 49) that the company's file on this order stated, albeit erroneously, that the value was

$50,000.00 (R. 194, 1877-8), and that prior to the order for the policy, the company also examined the option showing the selling price to be $100,00.00.

The findings further state that pursuant to the conspiracy defendants Parker "wilfully and intentionally concealed from and failed to disclose to the plaintiff their knowledge respecting the defect in title to Lot 2," knowing that plaintiff had failed to discover such defect (F. 37; R. 137-8).

We think we have covered this subject already. Even if it be assumed that the Parkers knew of this claim of the government, which is denied, to say that a layman, entirely ignorant of the law of real property titles, is required to tell a title company that he has been told somebody claims the title, to us is preposterous, as is the argument that when receiving a title report showing clear title to such property the applicant should believe that it is the title company, who presumably searched the records, that has made the mistake, not somebody else, who presumably did not.

The next statement in the findings of what was done "pursuant to said conspiracy" and in furtherance thereof, and "for the purpose of preventing plaintiff from learning of such title defect from the Winans family" was that they "concealed from the Winans family the fact that defendants Parker were the persons negotiating for the purchase . . . and were obtaining title insurance on such property." That is, it is fraud for a person to be an undisclosed principal.

If plaintiff wanted to know anything "from the Winans family," all it had to do was to inquire of them. Before ordering the purchaser's policy, Parker, as we have related, sent to the Title Company, through his attorney Ferris, Winans' homemade option (supra, 14-5), which warned that "The Seller" was not really giving assurances respecting the title but was only agreeing to convey "all the right, title and interest of The Sellers." But despite this information furnished the Title Company, it apparently now contends that if Winans (who previously had obtained a title policy from a title company and collected upon it, not in connection with any sale, without advising the title company concerning their information of the defect (R. 878-9)) had known that the Parkers were the principals, and were ordering title insurance, the Title Company would have someway learned something that would have caused it to examine all the public records bearing upon the title to this property, instead of just some of them.

Along the same vein, it is objected that the Winans "and their attorney did not discuss the description of the reserved acreage with the plaintiff because of defendant Stegmann's objection" (F. 38; R. 138).

This contention is gleaned from testimony that when Stegmann, Winans' attorney and a surveyor or two were endeavoring to reduce to writing an oppropriate description of a rather irregularly-shaped piece along the lake shore being reserved from Lot 1, somebody suggested that maybe the Title Company could help them with this description. Stegmann expressed the view that the

Title Company could not help them on a matter of that kind, his idea being that this was the job for an engineer or a lawyer, not for a title company (R. 1561-2).

The thought apparently is that if there had been one more approach to the Title Company—in addition to the several times that Parker had been there—it might have been induced to take another look into the title. Aside from the fact that Parker had no connection with this at all, we consider it to be really frivolous. It disregards the evidence of two of the Title Company's witnesses, one of them Winans' attorney, Vawter Parker (no relation), that prior to the final payment of the purchase money, they believed that appellants Parker were getting title insurance (R. 962-3, 995-6).

The morning that the deed was delivered, Winans' attorney Parker inquired at the Title Company's office whether they had insured this property, and was told that they had; but he could not recall at the time of trial whether this conversation was before or after the money had been paid and the deed delivered (R. 997-8). There is no suggestion in the evidence of any reason for any such inquiry *after* the sale was completed.

4. Additional Facts Proving Lack of Intent to Defraud

With all due respect to the learned trial judge, this case simply does not have the earmarks of an attempt to defraud a title company. The findings say that Parker knew for a long time prior to the day he ordered the title report that there was a claim of defect (F. 30;

R. 134). With this knowledge, according to plaintiff's theory, he decided to pay out $100,000 on the chance he could collect a portion of $125,000 from the Title Company—and delivered the Title Company the option showing that only $100,000 was being paid the seller for this and other property. Before doing this, however, according to the Company, he had told them that the value of all the property being purchased was $50,000 (R. 194-5).

It must also not be overlooked that before obtaining the title report Parker, as all parties agree, had started his negotiations for a sale of the property, involving, among other things, a cruiser going to the property from Eugene, a distance of probably 200 miles, or more, each way (supra, 12-4).

A person deciding to defraud a title company would not have ordered a title *report,* as both the findings (F. 30; R. 128) and the Title Company's employee said Parker did (R. 209); he would have ordered a title insurance *policy*. In ordering that policy he would immediately have specified the amount of the policy (and, in case of doubt, the maximum possible amount)—not have given the impression that it was to be $50,000.00 as it is claimed he did in this case (R. 194-5). And if a report only were ordered, when presented with it and learning that it showed good title he most certainly would not have told the company that he didn't know when, if ever, he would order a title policy or the amount thereof (R. 206-7, 209-10). That is, he would not have waited for another two weeks or more before

getting a definite contractual obligation from the company, for a definite amount.

If he paid $25,000.00 (which, if he were gambling on the chance a title company would make a mistake, he probably would not have done), it would have been *after* receipt of the title report and in reliance upon it, not before. He most certainly would not have permitted negotiations for a sale to drag along for several weeks; or have arranged that the purchase price could be paid to him over a long period of time, as Parker did here. In fact, he would never have gambled $100,000.00 at all, but only $1,000.00, i.e., the purchase price of the option. After spending that sum, he would have made a prompt sale of that option, for cash, obtaining for the purchaser a $180,000.00 purchaser's policy, and then made a speedy get-away.

And if, as the Title Company apparently contends, Parker knew enough about all these things to think he could defraud a title company, he most certainly would not have sent that company the option, with its red-flag warning (R. 31), before obtaining a policy.

And none of this would have been done personally by him. He would have followed the course which 90% or more of purchasers follow, of having his agent, an attorney or real estate man, handle all negotiotions with the Title Company, preferably by correspondence.

The court undoubtedly has observed the dilemma in which the Title Company is placed. The skulduggery on the part of Parker which counsel think they discover, started, they claim, long prior to the receipt of the title

report (F. 28 to 30; R. 133-5). It started at the beginning of Stegmann's negotiations with Winans, early in July. The alleged deception by Stegmann of his role, the segregation of the property into the $35,000 tract and the $90,000 tract, the "fantastic story" of the loans long before from Parker to Stegmann—all these alleged wrongdoings were *prior* to the receipt of the title report. But to say that before the Title Company was approached, these loggers had a premonition that it, through negligence, would fail to discover this alleged defect, which an inspection of public records would reveal, is just going too far—even for appellee Title Company.

So they say, inconsistently, that this "conspiracy" did not start when the negotiations began in July (F. 15; R. 125) when Stegmann is claimed to have learned that the title to a portion of the property was bad. It had not even started when the $1,000.00 option money was paid, or when a cruiser was hired to come 200 miles to cruise the property. The conspiracy is claimed not to have started until they learned that the Title Company had made the Great Mistake.

5. Alleged Defense of Failure to Notify Company of Defect

The next contention of the Title Company, upheld by the Trial Court, is that there was a failure of Parker to comply with the following provision of the purchaser's policy:

> "Upon receipt of notice of any defect, lien or encumbrance hereby insured against, the insured shall forthwith notify the company thereof in writing."

The contention and also the court's finding are that at the time Parker receiver his purchaser's policy on September 4, 1951, he "knew of the defect in title" and failed to give notice thereof to the Title Company prior to September 11, when final payment was made and that such failure constitutes a defense to the action of the *owner's* policy, issued later (F. 42; R. 139-40).

This contention prompts us to call attention to some recent apt observations of the California District Court of Appeal for the 1st District, in *Overholtzer v. Northern* Counties Title Insurance Co. 116 Cal. App. 2d 113, 253 P. 2d 116. That case concerned an insured who, like Parker, had unbounded confidence that the Title Company did not make mistakes in searching records. So he did not report to the company that his neighbor had orally stated that he had an easement over the assured's property.

"Under such circumstances," Justice Peters said in giving the court's opinion, "the title company should not be permitted to avoid liability on technicalities or upon a literal interpretation of an isolated clause of the policy that is qualified by other clauses. Title insurance policies should be interpreted in the same fashion as are other insurance policies, that is, liberally in favor of the insured, and against the insurer." Particularly is this so, he said, because "Title insurance is practically an unregulated business. No state control is exercised over the terms of the policies or over rates" (253 P. 2d at 120).

But in addition to the above, we submit the following answers to the Title Company's contention:

(1) It will be noticed that there is no claim made that between the time of the issuance of the purchaser's policy and the payment of the entire purchase money, any notice of any kind was obtained by either of the Parkers with respect to the claim of the government, or of any other alleged defect. Apparently the Title Company wishes the court to construe "upon receipt of notice" as including information which they claim Parker obtained *prior* to the issuance of that policy. This is a plain distortion of the English Language.

(2) The words "receipt of notice" mean something different than vague or uncorroborated information which may have come to one's attention. Webster's dictionary defines receipt as: "Act of receiving; also, the fact of receiving or being received. 'At the *receipt* of your letter.' "

Obviously. it was not intended that an insured must advise the company, for instance, that his friend Jones says that the insured is not the owner. "Notice" when used in this context, upon which such important consequences depend, can only mean, as it does in other important contexts, "information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source . . .," to quote *Lauderback v. Multnomah County,* 111 Or. 681, 693-4, 226 P. 697, 701 (involving required notice of road proceedings.) quoting 2 Pomeroy's Equity Jurisprudence, 3 ed., sec. 594.

The letter which Parker received from the government (Ex. 102; R. 2207-8) a few days after obtaining his

owner's policy is the type of "notice" of a defect comprehended by the policy.

In *Hoffman v. Employers Liability Corporation,* 146 Or. 66, 29 P. 2d 557, a liability policy provided that, "upon the *occurrence of an accident* covered by this Policy the Assured shall give immediate written notice thereof." (Italics added). The insured's superintendent of construction one morning observed that a barricade had been knocked down and "was informed that some woman had fallen over the barricade the evening before, but who she was or the extent of her injuries, if any, was unknown to his informant" (146 Or. at 69, 29 P. 2d at 559). No notice was given to the insurance company for a year following the accident.

The trial court, upon these facts, concluded that the superintendent's "information as to the happening of the accident was so indefinite and uncertain in its nature as to constitute no notice to plaintiff that an accident covered by the policy had happened" (146 Or. at 82, 29 P. 2d at 564). The Supreme Court, two justices dissenting, affirmed the judgment for the insured.

The above case, it should be noticed, provides that upon the *mere occurrence* of an accident, written notice to the company was to be given; whereas here it is only "upon receipt of notice" of a defect of title. There was no such receipt of notice until Parker received the letter from the government.

3. The Parkers' claim against the Title Company is not based upon the *purchaser's* policy, but upon the *owner's* policy, obtained September 14, 1951. As we have

set forth above at quite some length, there was no duty on the part of the Parkers to pass on to the Title Company information they may have obtained prior to the issuance of the policy. So, even if this court should agree with the Trial Court that such information had been obtained by the Parkers before they obtained their owner's policy, such fact would be no defense.

6. Alleged Defense of Misrepresentation in Negotiations for Settlement

The next, and final, alleged defense which the court found had been proven by the Title Company was that in connection with settlement negotiations Parkers "represented to the Title Company that they had paid $120,250 for Lots 1 and 2 when, in fact, they had only paid $95,250.00" (R. 115, 140). This, in the court's opinion, was "a material misrepresentation made with intent to defraud the Title Company and it may avoid the policy on that ground."

The difference between the amount represented by Parkers to have been paid and the amount which the court found actually was paid, that is the sum of $25,000, is represented by the check which the Parkers and Stegmann testified was given to Stegmann on August 13, 1951, in payment for the option. The evidence which the court felt overcame the direct testimony of the delivery of the check as consideration for the option was entirely circumstantial. Apparently, the principal item of this evidence was the fact the check was not cashed,

being returned to the Parkers after the government advised them of its claim.

To us it would seem that if two persons concoct a scheme to convince others that a check represents an actual transfer of money, when it does not, the one thing they would not *fail* to do would be promptly to cash the check. But be that as it may, it is very clear that if there was falsification as to the amount paid by Parkers for the property, this is no defense to payment of the policy. This alleged defense, it should be noted, is not based upon any provision either in the policy or in Oregon statutes; but we venture to prophesy that the decisions, if any, to be cited by the Title Company's attorneys on this point will be based upon policy provisions, or statutes, or both.

There are, of course, a large number of decisions on the effect of "false swearing" as a defense in insurance cases. But these cases, almost if not entirely without exception, involve *fire* insurance policies. Almost from the beginning, in this country at least, provisions in fire insurance policies, mostly based upon the statute, have provided that any false statement made in proofs of loss or false swearing upon examinations provided for by such policies, constitutes a defense. In the absence of such policy provisions, there is no such defense.

> "Fraud and false swearing in proofs of loss are only a defense if the policy itself contains a stipulation to that effect." *Blair v. National Security Insurance Co.* 126 F. 2d 955, 960 (3d Circ.)

It is rather surprising that more cases are not found on this point, but although in some of the numerous

cases little reference is found to the policy provisions, in all of them that we have been able to discover the basis is actually such a provision in the policy. Oregon cases, which are illustrative of those from other states, are *Fowler v. Phoenix Insurance Co.,* 35 Or. 559 559-60, 57 P. 421, 422; *Willis v. Horticultural Fire Relief,* 69 Or. 293, 296, 137 P. 761, 762; Ann. Cas. 1916-A, 449; *Ward v. Queen City Fire Insurance Co.,* 69 Or. 347, 351-2, 138 P. 1067, 1068.

The Oregon statute involving fraud and false swearing as a defense in fire insurance policies, is not an unusual type. But, while perhaps only remotely relevant here, we may call attention to the fact that even though what is claimed to have happened here had taken place in a fire insurance case it would not even there be a defense. Our statute, passed in 1907, now ORS 744.100, provides that every policy shall contain a provision that it shall be void if "the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof . . . or in case of any fraud or false swearing by the insured relating thereto."

The above is also the identical statutory provision in the State of Washington. In *Briggs v. Madison,* 195 Wn. 612. 82 P. 2d 113, the insurance company defended under a policy with the above provision on the ground of false swearing, but the evidence showed only that the insured "testified falsely as to payment of the full amount of the purchase price." Since, as the court pointed out, the policy provision "relates to false statements

made in connection with proofs of loss and value of the property" and accordingly "any statement, true or false, respecting the consideration paid for the property has no bearing on the issue" (82 P. 2d at 116-7).

CONCLUSION

For the reasons herein stated, the judgment in favor of appellee Title and Trust Company cancelling the owner's policy issued to Chet Parker should be set aside and a judgment entered for Parker for the amount of his loss. In view of the testimony as to the value of the timber only, $180,000.00 on both tracts, and of the expense to be incurred in logging the small remaining tract (R. 504-7), it would seem that his loss is at least $125,000.00 and that judgment should be entered for that amount, plus interest.

We assume that the case will then be remanded to the Trial Court with directions to take evidence on the reasonable value of attorneys' services rendered Parker in this action on the policy, so that judgment may also be entered for that amount, pursuant to the Oregon statute (ORS 736.325).

Respectfully submitted,

CAKE, JAUREGUY & HARDY,

Attorneys for Appellants,
Chet L. Parker and Lois Parker.

THE WINANS' JUDGMENT AGAINST APPELLANTS PARKER

This portion of the brief is devoted to the appeal by the Parkers from the judgment for $9,000.00 against them in favor of the five appellees Winans. The jurisdictional statement already given covers this judgment, the jurisdiction being based on diversity of citizenship.

STATEMENT OF THE CASE

In the interest of conserving space, attempt will be made to avoid repetition of the facts already given which have a bearing upon this portion of the appeal. It should be sufficient here to say, by way of summary, that Ethel and Paul Winans gave appellant Stegmann an option to purchase real property, that this option was assigned to appellant Chet L. Parker, who eventually obtained a deed, and that there is evidence in the case, which, though denied, was believed by the trial court, that both Stegmann and Parker had been advised by Winans of a claim of the United States Government to that portion of the property that has been referred to as Lot 2.

The contention of the Winans, upon which the judgment in their favor is based, is that in subsequent negotiations with appellant Title and Trust Company to recover upon a title policy the Parkers stated to representatives of that company that they had not been advised concerning the above title defect and, in fact,

that they had been told by the Winans that the Winans had good title. The finding on this latter point was, rather, that the Parkers "by their words and conduct wilfully and intentionally induced the plaintiff to believe" that Winans had represented that they had good title (F. 43, R. 140-1).

A finding further states that these representations were made with knowledge that the Title Company would institute legal proceedings against the Winans who thereupon "would be subject to adverse publicity in Portland and in Hood River" (F. 46, R. 142). We believe it to be a fact that, beyond doubt, the conferences at which these statements were claimed to have been made were largely for the purpose of obtaining evidence for that lawsuit. See particularly the testimony of Mr. Buell, the Title Company's attorney (R. 1772-3, 1796). The same finding further states that in the original complaint in this case it was charged that the Winans did not disclose to Parker and Stegmann the Government's claim of ownership or the settlement which they had theretofore made by reason of that claim on a title insurance policy which had ben issued to them, and also that they falsely represented they were the owners of a marketable title to Lot 2.

We call particular attention to the fact that the findings do not state that the complaint which was then filed had any allegations of false representations by the Winans *to the Parkers* (See F. 46; R. 142), and that that complaint itself, which is in evidence (R. 2241-5), makes no such charge.

The findings further say that these false misrepresentations made by the Parkers to the representatives of the Title Company "were largely responsible for the inclusion of third party defendants Winans as defendants" (F. 47; R. 142-3) and that the charges made in the complaint "were copied and published by a newspaper at Hood River, Oregon" (R. 142).

SPECIFICATION OF ERRORS
(Winans' Judgment)

The specification of errors hereinbefore set forth in connection with the Title and Trust Company's judgment (supra, 6-9) were directed to findings number 1 to 43, inclusive, and we resume here at that point, the following specifications having reference to the Winans' judgment.

The court erred in finding:

That the Parkers represented to the Title Company that the Winans had not divulged to them any defect in the title to Lot 2 or disclosed their knowledge of the claim of the United States or induced the Title Company to believe that the Winans had represented themselves to be the owners of Lot 2 and to have good title (F. 43, R. 140-1); that said alleged representations by the Parkers constituted slander against the Winans or imputed to the commission of a crime (F. 45, R. 141-2); that said alleged representations by the Parkers to the Title Company were made with knowledge that the result would be to require the Winans to incur expenses in

defense of legal proceedings and to clear their names and reputations of false imputations, that the original complaint in this case charged that the Winans falsely represented to the Parkers that they were the owners of marketable title to Lot 2 (if that be the intented purport of said finding) or that it charged that none of the Winans disclosed to the Parkers the claim of ownership of the United States, or the settlement of the policy of title insurance issued to the Winans, or that any such charges were copied or published by a newspaper in Hood River County, Oregon, or given wide circulation in that county; or that any such representations were the result or in furtherance of any conspiracy in which the Parkers were parties (F. 46, R. 142); or that any representations by the Parkers to the Title Company were responsible for the inclusion of the Winans as defendants in the original action; or that such action or the publicity which it received caused any legal injury or damage to the Winans in any respect whatsoever (F. 47, R. 142-3); or that as a result of any falsehoods on the part of the Parkers that the Winans were damaged in the sum of $9,000 or any other sum (R. 143).

The court also erred in its Conclusions of Law that the Winans were entitled to judgment against the Parkers for $9,000 (C.V.); and that the cross claim of the Parkers against Winans should be dismissed (VII) and that the third party defendants were entitled to judgment for costs against the Parkers (R. 144-5).

The court also erred in granting judgment to the Winans against the Parkers for $9,000 together with costs and disbursements (R. 149).

SUMMARY OF ARGUMENT
(Winans' Judgment)

Even though the facts were as claimed by the Winans and found by the Court, there would be no liability. What the Parkers are claimed to have done may be characterized either as (1) instigating a groundless suit against the Winans, or as (2) consulting with attorneys respecting evidence to be furnished for a prospective lawsuit. In the former case, the rule is applicable that one who instigates a malicious civil prosecution against others is liable to the same extent, but not more, than the party who files such a wrongful action, and in Oregon there is no liability in such case. In the latter case, the statements made by the prospective witnesses with respect to the testimony is, in Oregon, absolutely privileged. Our third legal contention is that the statements alleged to have been made by the Parkers to the Title Company did not constitute slander.

But we shall show that the evidence does not support the finding that any statements were made by either of the Parkers to the Title Company's representatives regarding alleged misrepresentations by any of the Winans respecting their title; that in the original complaint there was no charge that the Winans had misrepresented anything to the Parkers, nor, as is contended, was there any publicity given to any such charges.

Finally, the only damages sustained by the Winans, for which the court found they were entitled to recover, consisted of attorney's fees in defending and prosecuting

this case. This is not an element of compensable damages.

ARGUMENT

The charge against the Parkers is, as already stated, that they represented to the Title Company that "the third party defendants," i.e., the Winans, had not divulged to them the defect in Lot 2; and also "by their words and conduct wilfully and intentionally induced the plaintiff to believe that the third party defendants had represented themeselves to be the owners of Lot 2 and to have a good title thereto" (F. 43, R 140). These statements are said to have been false and to be slanderous because they charged "third party defendants Winans" with a crime, that set forth in O.C.L.A., sec. 23-550, now ORS 165.220, of falsely representing to be the owners of property and executing a conveyance with intent to defraud (R. 141-2). It is further said that these false representations were responsible for the inclusion of the Winans as defendants (R. 142-3) and that the Winans have suffered damages in the sum of $9,000.00 (R. 143). The court's opinion and findings are clear, as we shall show, that the $9,000.00 was awarded the Winans because of attorneys' fees incurred by them in this case.

Alleged Representations by Parker Would Not Be Actionable Slander

Before going further into the facts, we shall show that the charges against the Parkers do not constitute a cause of action.

The Court's opinion says that "During the negotiations between Parker and representatives of the Title Company, Parker informed them that the *Winans family* did not divulge the defect in the title and represented that they had good title" (R. 115. Italics added.). The findings are to the same effect (F. 43; R. 140). But the evidence makes it clear that in the conferences with the Title Company's representatives the only member of the Winans family referred to as having discussed the property was Paul Winans (R. 1772-3, 1803-4).

It is well-settled in Oregon, as elsewhere, that the categories of actionable oral defamatory statements are much more restricted than in the case of written statements. (See, e.g., *Reiman v. Pacific Development Society,* 132 Or. 82, 87-8, 284 P. 575, 577.) Without here detailing them, it is sufficient to say that in this case the Winans alleged, and the court found, that these alleged representations were slanderous, and therefore actionable, because they charged "the Winans" with the commission of a crime (F. 45; R. 141-2). This alleged crime is said to be violation of O.C.L.A., sec 23-550, now ORS 165.220, which reads as follows:

> "If any person shall falsely represent that he is the owner of any land to which he has no title, or shall falsely represent that he is the owner of any interest or estate in any land, and shall execute any conveyance of the same with intent to defraud anyone, such person, upon conviction thereof, shall be punished by imprisonment in the penetentiary not less than six months nor more than two years."

The following facts are undisputed:

1. The person who claimed to own the property, and who (except for the claim of the government) had the record title, was Ethel Winans. (See title chain, R. 1890; option, R. 30-1).

2. The person who executed the conveyance was Ethel Winans (R. 27-30).

3. There is absolutely no evidence, nor any contention, that Ethel Winans ever discussed the property with the Parkers, nor any evidence that the Parkers represented to the Title Company that she had done so. It seems to be agreed that the Parkers, on the contrary, stated they did not believe she would be a party to any fraud and were surprised when shown the correspondence between her and the other title company (R. 1780-2, 1808-10, 1836).

4. It therefore follows that even though the contentions of the Winans were true, Parkers made no representations of fact which would constitute a crime; for to constitute a crime under the above statute a person must have both (1) made false representations and (2) executed a conveyance with intent to defraud.

The Statements Alleged to Have Been Made by the Parkers to the Title Company were Absolutely Privileged

As already indicated, the statements alleged to have been made by the Parkers to representatives of the Title Company were for the purpose of having the information thus given used by the attorneys for the Title

Company in bringing an action in which the Winans would be made parties defendant (R. 1772-3, 1996). Any such statements must necessarily be viewed either (1) as statements made by a prospective witness of facts concerning which he would testify, or (2) as an attempt to induce another to institute legal proceedings against another, or both. In either event, there would be no cause of action against the Parkers.

While the same considerations of policy would seem to be involved regardless of which of the above two views is taken, the two aspects of the situation will be discussed separately.

Statements Privileged as Communications Preliminary to Proposed Judicial Proceedings.

At this point we wish to call to the Court's attention the fact that in the same pleading filed by the Winans charging the Parkers (in conspiracy with Stegmann) with maliciously defaming them (R. 89), it was also charged that the Title Company in filing the original complaint not only published "false and defamatory statements" concerning the Winans family in that it charged that "the Winans family falsely represented that they were the owners of a marketable title to said Lot 2" but that these charges by the Title Company were made "wilfully and maliciously and with reckless abandon and with no endeavor whatsoever to check the truth of said defamatory statements" (R 82-3). Judgment was asked against the Title Company and the Parkers in the alternative (R. 91).

This charge against the company seems to have been abandoned and no mention of it is made in the findings. We apprehend that counsel for the Winans abandoned it because, upon further study, they learned the law of Oregon to be that such statements in judicial proceedings are subject to absolute privilege. And statements made to a prospective plaintiff preliminary to the filing of the complaint and for the purpose of furnishing information for such complaint, or as a basis of testimony to be given, are subject to the same privilege.

The latest decision of the Supreme Court of Oregon discussing this privilege as applied both to statements in the pleadings and to statements of witnesses, either at the trial or prior thereto, is *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P. 2d 922. The complaint in that case alleged that the defendants "conspired fraudulently and maliciously to injure plaintiff's good name" by executing certain affidavits which were filed in divorce proceedings. One of the defendants was, and the other was not, a party in the divorce case. The affidavit given by each defendant, the Court held, "constituted actionable libel unless privileged." They were filed in support of a motion of defendant husband for modification of the divorce decree relative to the custody of the children, this motion being denied.

The Court reaffirmed the rule that pertinent and relevant matter in judicial proceedings is absolutely privileged, regardless of its defamatory character. "Neither is it material," the court said, quoting from *McKinney v. Cooper,* 163 Or. 512, 98 P. 2d 711,

"whether the defendant in making such statements was actuated by good or bad motives" (183 Or. at 67, 190 P. 2d 925). The court also referred to one of its former decisions respecting the privilege of witnesses in judicial proceedings, *Cooper v. Phipps,* 24 Or. 357, 33 P. 985, 986, 22 L.R.A. 836. The rule laid down by the court was supported, so the court held, by the Restatement of Torts, Vol. 3, secs. 587, 588. The first of these sections has reference to a party to judicial proceedings and the other to a witness, the latter reading as follows:

> "A witness is absolutely privileged to publish false and defamatory matter of another in communications *preliminary to a proposed judicial proceeding* and as a part of a judicial proceeding in which he is testifying, if it has some relation thereto." (Italics added.)

Comment "b" to the above Restatement, section 588, after stating that the rule protects a witness while testifying says:

> "It also protects him while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal."

In the above Oregon case, affidavits were filed, while in the present case it is alleged that the attorneys incorporated in the complaint the substance of Parker's statements. As stated, the charge was made in that case, as it is here, that the statements were part of a conspiracy. As we have shown in another portion of this brief (supra, 37-9), such an allegation adds nothing to the case. With respect to this, the court said (183 Or. at 68, 190 P. 2d at 928):

> "The plaintiff asserts that this is an action on the case for conspiracy, but we see in it only an allegation that the defendants maliciously and falsely agreed to make and made certain libelous statements, which statements were protected under the rule of absolute privilege. The plaintiff cannot avoid the defense of privilege which appears in her own complaint by giving to a libel suit the name of an action on the case for conspiracy."

So, in the present case, whatever the Parkers said in conferences with the four attorneys—two of them their own attorneys and the other two representatives of the Title Company—was absolutely privileged. To the same effect are *Schmitt v. Mann,* 291 Ky. 80, 163 S.W. 2d 281; *Richeson v. Kessler,* 73 Ida. 548, 255 P. 2d 707, 709.

No Liability of Parkers for Causing Winans to be Sued.

As suggested above the protection afforded a party or a witness in making statements in connection with litigation is closely akin to the protection afforded a party in filing and prosecuting a lawsuit. In the one case, it is particular statements set forth in pleadings or in testimony that are claimed to injure a third person; and in the other case, it is claimed that the entire basis of the lawsuit is false and fraudulent, thus causing unjustifiable damage to the party sued.

Just as courts recognize the public interest in protecting parties and witnesses in statements they make in the pleadings, or otherwise in furtherance of a lawsuit, so also, except in exceptional circumstances to be shortly mentioned, most courts hold that a similar

privilege protects a party against liability based on claims that his lawsuit is itself false, fraudulent or malicious.

It seems clear that one who by his statements to another regarding alleged facts causes him to start a lawsuit has the same protection as the one who sues. That is to say, the Parkers, if it should appear that they caused Title and Trust Company to include the Winans as defendants have the same protection that they would have had had they themselves sued the Winans upon precisely the same cause of action—as the Title Company endeavored to induce them to do (R. 1788-90, 1799-1801, 1841-5; Ex. 7-10B; R. 1901-17). While we have found no cases exactly in point in cases involving alleged civil malicious prosecution, this is the rule with respect to alleged criminal malicious prosecution 34 Am. Jur., Malicious Prosecution, sec. 25, pp. 717-8.

In Oregon, the rule, which seems to be in accord with the weight of authority, was early laid down that in the absence of an arrest of the defendant or seizure of his property by attachment or otherwise, there is no cause of action for malicious prosecution of a civil suit.

> "Courts are ever open to litigants for the adjudication of their rights, and, although a party may have been induced by malice to institute an action, so long as he does not cause the arrest of the defendant, or his property to be attached, the costs awarded upon the dismissal of the proceedings are deemed by the legislative assembly suitable compensation for the injury suffered by the defendant in consequence of the action, and the law affords him no other remedy, for if he were permitted to maintain an action of malicious prosecution when he had

> sustained no special injury, the former plaintiff, if the action terminated in his favor, might institute a similar action, which course could be repeated; until the plaintiff won, thus rendering litigation interminable . . . If, however, the defendant has been arrested or his property attached in an action which terminates in his favor, he has sustained a special injury, which cannot be compensated by the costs and disbursements prescribed by statute, and, if such action were instituted through malice, and prosecuted without probable cause, upon the common-law theory that wherever there is an injury there is also a remedy, the defendant may maintain an action of malicious prosecution to recover the damages sustained.
>
> *Mitchell v. Silver Lake Lodge,* 29 Or. 294, 296-7, 45 P. 798.

In a later Oregon case, based on alleged malicious prosecution of a civil suit, the Court's attention was not called to the case from which the above quotation is taken, and the Court assumed that the question was still open in this state, but found in favor of the defendant on other grounds. *Hoffman v. Kimmel,* 142 Or. 397, 20 P. 2d 393.

This Court, in an appeal from the Oregon District Court, but in a case in which the Washington law applied, pointed out that the rule of the Washington courts that no cause of action exists for malicious prosecution of a civil suit, in the absence of seizure of persons or property, is "in conformity with the general thought on the subject," and affirmed the lower court's judgment for defendant. Although the "nubbin" of plaintiff's complaint was said by the Court to be "that appellees maliciously conspired to destroy its business" (138 F. 2d

at 637), no further reference to the charge of "conspiracy" is found in the opinion—obviously it added nothing to the case. *Vancouver Book and Stationery Co. v. L. C. Smith & Corona Typewriters, Inc.*, 138 F. 2d 635, 637 (C.A. Or.), Cert. den., 321 U.S. 786.

So regardless of whatever basis the Winans are endeavoring to assert for their claim against the Parkers, there is no liability.

While we think the Court will not find it necessary to go further in considering the claim of the Winans against the Parkers, we shall now proceed to show that the facts are much different than as claimed, and as assumed above.

The Evidence in the Winans' Claim Against the Parkers

We have already pointed out, and repeat here for emphasis, that there is no evidence whatsoever that in their negotiations with the Title Company the Parkers made any statements regarding the Winans which could possibly have charged them with the commission of the statutory crime set forth in the court's opinion (R. 116-7) and referred to in the findings (R. 141-2), a crime which is committed when a person after having falsely represented to be the owner of property purports to execute a conveyance thereof. Ethel Winans was the one who agreed to convey her "right, title and interest" in the property (R.31) and was the one who did convey her right, title and interest (R. 27). She was accordingly

the only one who could have committed the crime; and there is no evidence that the Parkers ever said that she made any representations, true or false, respecting her title.

The efforts to elicit testimony regarding these alleged representations which Parker claimed to have repeated to the officers of the Title Company were with respect to representations by Paul Winans, the only person who negotiated the deal. But even here there is scarcely a scintilla of evidence. The fact is that the subject did not arise during these negotiations. The Vice-President of the Title Company, himself a lawyer (R. 1803), as a witness for the Winans was very emphatic that at none of these conferences was any statement made by either of the Parkers regarding representations made by Winans (R. 1805-7). In fact, the one thing that seemed to impress him was the surprised look on the faces of the two Parkers when they were shown the correspondence, referred to above, between Miss Winans and the other title company (R. 1807-10).

Mr. Buell, one of the attorneys for the Title Company, representing the company in this case, was present at the negotiations, and could recall no such representations (R. 1772); and the same was true with respect to one of the two attorneys representing the Parkers at these conferences (R. 1859), the other one not being questioned on the subject (R. 1838-52).

The only evidence whatsoever in support of the contention that there was any such representation made was a statement made by Parker himself in his deposi-

tion, introduced in evidence as an admission; but at the trial he testified that he had no recollection as to whether or not he made any such statement to the Title Company's representatives, although he might have (R. 497-50).

While the above is the evidence showing an absence of statements by the Parkers to the Title Company's attorneys regarding representations by Winans, they and their attorneys *did* volunteer the information to the attorneys for the Title Company that Winnans had stated that his title was subject to a *defect* (R. 1785-1852). This was the statement made by Winans to Parkers' attorney, Abraham, when the deed was delivered, already related (supra, 18-9), and was the very first information which the Title Company obtained of that incident (R. 1785).

The court's opinion mentions the fact that in each of the drafts of the proposed contracts of settlement between the Parkers and the Title Company there was a recital to the effect that "the Parkers have represented to the company and hereby warrant that they had no knowledge of any defect in the title to said Lot 2 prior to their payment of the purchase price therefor and acceptance and recording of the deed to said property." The opinion states that the Parkers did not "object to the inclusion in the contract of such paragraph" (R. 115-6). This apparently is the basis for the finding that the Parkers "by their words and conduct" induced the Title Company to believe that the Winans had represented themselves to be the owners (F. 43, R. 140)

The Parkers themselves never read the contract (R. 2068-9), it being read by one of their attorneys, not audibly (R. 1833), and according to their testimony he discussed only the substantive provisions, particularly the provisions requiring Parkers to sue the Winans. Mr. Buell, the Title Company's attorney, testified to the same effect (R. 1798). At any rate, they never signed it.

The fact, referred to in the Court's opinion (R. 116), that all the negotiations were "predicated on the lack of knowledge of the title defect by the Parkers"—and, of course, they still contend that they had no such knowledge—cannot be called slander.

But if the further evidence is required that there was no discussion at the time of any of the settlement negotiations respecting any representations made by any of the Winans to the Parkers, it is to be found in the original complaint, filed November 27, 1951. The contents of that document are important not only on the question whether Winans was damaged as a result of representations made by the Parkers to the representatives of the Title Company, but also as throwing light on what the Parkers actually said to those representatives.

Since attorney Buell, who drew that complaint, testified that the Parkers had said nothing to him about any representations made by any of the Winans regarding the title, we would hardly expect him to set forth in the complaint allegations that the Winans *did* make such representations. As we shall presently show, he did not do so.

We also call attention to the fact that over six weeks elapsed between the last of the conferences and the filing of the original complaint; and that during this time the Title Company's representatives made an extensive investigation.

The day before the original complaint was filed, Buell wrote a letter to Parker's attorneys. In this letter he stated that "numerous changes of mind on the part of Mr. and Mrs. Parker . . . together with other evidence which our client has discovered, indicates to our client that the Parkers have not made a full disclosure to this company" (R. 1924). Buell also testified to the investigation that he and others made during that six weeks' period (R. 1784-5). He said that there were a "large number of important circumstances that led up to the filing of the complaint" (R. 1783). However, nobody from the Title Company interviewed either Stegmann or any of the Winans family before the complaint was filed.

Certainly there is no evidence that statements by the Parkers to the company was what induced the Title Company to bring the action, nor that any such statements "were largely responsible for the inclusion of third party defendants Winans as defendants in the original action filed by plaintiff," to quote the findings (F. 47; R. 142-3). The fact is, as the Title Company's attorney testified, they had decided to sue the Winans before they ever met the Parkers (R. 1772)

The Charges in the Complaint Said to Have Been Instigated by the Parkers

This case went to trial upon an amended complaint, but it is the allegations of the original complaint, and the resulting publicity thereof, which are claimed to have damaged the Winans. This original complaint (R. 2241-52) at no place made any charge that any of the Winans falsely represented anything to the Parkers. But, although no representatives of the Title Company ever talked to Stegmann, or for that matter to any of the Winans, until subsequent to the filing of the complaint, the complaint did allege that Paul and Ethel Winans "falsely represented to *defendant Walter Stegmann* that they were the owners of a marketable title to said Lot 2." (R. 2246. Italics added.)

It is thus clear that these charges of misrepresentations (by Winans to Stegmann) made in the original complaint were not based upon any direct evidence thereof. Rather, Buell, as he testified, "was relying primarily on the option itself, which I considered to be a representation of marketable title, . . ." (R. 1772-3).

While it is alleged in this original complaint that neither Ethel nor Paul Winans disclosed to the Parkers the facts regarding the claim of ownership of the United States, it is also alleged that before they obtained the Owner's policy of title insurance the Parkers, as well as Stegmann, knew about the claim of the United States (R. 2249).

Of course, the amended complaint filed more than thirteen months after the original, and also the third

party complaint also filed by the Title Company, had many other contradictory contentions. Among other mutually contradictory allegations, that complaint alleged that the Parkers knew all about the claim of the Government when they applied for a title report (R. 12), that the Parkers relied upon Stegmann's representation that he had "a good and sufficient option to acquire title" to the property, but that both Parkers and Stegmann were mutually mistaken (R. 17), but also that Stegmann knew the title was unmarketable but falsely represented to the Parkers that it was a good title (R. 18).

Publicity in the Newspapers

The court found that the action received publicity in the newspapers and (although the opinion did not mention this, R. 115-6) that this publicity caused damage to the Winans (R. 143). However, there is nothing in the publicity that even hints that the Winans made any misrepresentations to the Parkers. One of the two articles published subsequent to the filing of the complaint quotes the allegation of the complaint, referred to above, to the effect that "Winans falsely represented to *defendant Walter Stegmann* that they were the owners of a merchantable title" (R. 1931). The news article also stated that "The complaint states that the Winans, Stegmann and Parker all knew of the title difficulties and did not tell the Title and Trust Company" (R. 1931). (Italics Added) Certainly this does not suggest that the Parkers had slandered the Winans.

The only other newspaper article in evidence published after the complaint was filed (R. 2276-7) makes no derogatory statements whatever about the Winans.

Winans Did Not Suffer Damages

It is charged in the complaint of the Winans against the Parkers that as a result "of said conspiracy and of the false and defamatory statements" the Winans "have been damaged in their reputation and in their business and have been exposed to ridicule, contempt and disgrace" and it is also said that as a result thereof they were "forced to retain and pay for the services of attorneys to defend them in the present action" (R. 90).

In addition to stating that the representations of the Parkers to the title company attorneys were "largely responsible for the inclusion of third party defendants Winans as defendants in the original action" (R. 143), a charge which we have already discussed, the findings are to the effect that the charges "were copied and published by a newspaper at Hood River, Oregon" (R. 142) and that the "defendants Winans" were damaged "in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in said action" (R. 143).

The findings also state that as a result of the publicity two of the five Winans, that is Paul and Linnaeus, were damaged because the action and publicity resulting therefrom made it more difficult for them "to obtain credit in connection with their respective businesses" (R. 143). But the evidence does not sustain any of the

above statements.

As we have already pointed out, nothing in the newspaper publicity could possibly have been the result of any statements made by the Parkers to the Title Company. Furthermore, it wasn't the details of the allegations in the complaint but the fact of the publicity of the Winans having put over this deal that caused the talk around the town, and this was disclosed by newspaper articles long prior to the filing of the complaint (R. 1925-7, 2274-5).

There were four witnesses who testified for the Winans regarding the effect of the publicity on their reputation, their testimony being almost entirely confined to Paul Winans, or "Mr. Winans." One of them said that "since the first of the year we have required substantial collateral for all of the loans we have against the Winans" (R. 1680), but that this was just because he was a defendant in a law suit, not because of the particular charges (R. 1682-3).

Another one was asked whether he had read the articles "regarding the filing of a suit for false and fraudulent representations" (R. 1685), and he said "as a result of that lawsuit" it would be necessary for him to have some money sooner than otherwise would be the case in connection with a house he was building for "Mr. Winans" (R. 1687). But here again it was merely the fact that a lawsuit was filed against Winans that caused him to take this course (R. 1691). In fact, he stated that he didn't believe any of these charges—"I would not believe any editor or anybody else until

a case like this was completed, until I saw the end of it" and regardless of who it might involve "I still would have disbelieved it" (R. 1693).

The County Judge was also called as a witness by the Winans. He went into a little more detail. He had heard people talk about the Winans both before and after the lawsuit was filed. Even before it was filed, some of them thought that Paul Winans was the kind of a man who might pull this kind of a deal (R. 1698-9); and since the filing of the action perhaps as many as twenty—but he doubted that there were as many as fifty—had said that they thought he was the type of man "that would do this which was reported in the paper" (R. 1699-1700).

It must, of course, be borne in mind that it was only about eight years earlier that the Winans, with knowledge of the government's claim, but without disclosing that fact to the Title Company (R. 878) had obtained a title policy from another company which likewise did not discover this defect until too late, and made a compromise settlement for $3,000. Just prior to the issuance of the policy, there was a deed recorded to Ethel Winans from her parents (R. 1890, 1895), although there was no actual sale. So naturally when news of the present sale and of the same mistake having been made by another title company became known, one would expect considerable talk among the local residents, and that some of them, even before the complaint was filed, would have suspicions of the honesty of those who were twice beneficiaries of such an identical error.

The best evidence that such unfavorable gossip was prevalent even before that complaint was filed came from Paul Winans himself. On November 22, 1951, being five days *before* the original complaint was filed and at a time when Winans said he did not know that he was to be sued (R. 1726), he sent a telegram to Parker (Ex. 103; R. 880, 2208) reading as follows:

> "Can you contact me Congress Hotel, Portland, tomorrow 1:30 p.m. to 3:00 p.m. Re statement believe mutual interest best served through primary conference with you.
>
> Paul Winans"

Asked why he sent this wire, he said (R. 881):

> "There were a lot of factors, Mr. Jaureguy, building up before that that would take some time to explain. However, after this publicity came about through the breaking of this matter in the Hood River Sun, I and the family felt that we were being put at a disadvantage through this publicity through false statements, and we wanted to do something to correct it in the public mind. It was causing a lot of interested gossip and discomfort of mind to our people so I figured that I would do something about it, and before doing that, from what I had read in the paper, I thought it might involve perhaps also Mr. Parker with whom, so far as I knew, my relations were friendly, and I thought it was only fair to give him a chance to do something about it before I issued a statement."

Of course, the publicity given in one of the newspaper articles following the filing of the complaint (R. 1928-31) regarding the prior compromise settlement with the other title company, followed by a quotation from the complaint that prior to this sale the "Winans falsely represented to defendant Walter Stegmann that they

were the owners of a merchantable title" could not help but create a bad impression of Winans. There is no contention that any of this information came from the Parkers.

However, the damages allowed the Winans by the court actually were not for any loss of reputation, or diminution in credit standing, but for the expenses of defending this lawsuit.

Winans' Attorneys' Fees As Their Measure of Damages

That the court considered only the attorneys' fees incurred by the Winans in allowing damages, is clear both from the opinion and from the findings. The opinion states that "the Winans are entitled to a judgment against the Parkers and Stegmann for the damages they incurred as a result of the slander" and that they "have suffered damages at least equal to the amount of attorneys' fees which they incurred in defending this action" (R. 117). No reference is made in the opinion to any other alleged damages.

The findings state that the filing of the action and the publicity which it received "caused injury and damage to the third party defendants Winans in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in such action." The findings further state that the action and publicity "made it more difficult for third party defendants Paul Winans and Linnaeus

Winans to obtain credit in connection with their respective businesses" (R. 143).

The next finding is that "the third party defendants Winans suffered damages in the sum of $9,000.00" (R. 143) and the judgment in this amount is in favor of "the third party defendants" that is the five Winans (R. 149).

Since only two of the five members of the Winans family were found to have suffered damages other than attorneys' fees and other expenses of this lawsuit, they would be the only ones entitled to recover for those damages. This makes it abundantly clear that the judgment of $9,000 is for attorneys' fees, and perhaps other expenses, in connection with the defense against the Title Company's claim against the Winans for rescission and recovery of the purchase money, as well as for prosecuting their own claim against the Parkers and Stegmann and the Title Company.

The court in its opinion said that, pursuant to a stipulation, testimony would be taken respecting the amount of work performed by the attorneys for the Winans and that "Such amount or such portion of the work which I believe should be chargeable to the Parkers will be awarded the Winans not as attorneys' fees but as damages for the slander" (R. 118).

Such a hearing was held on March 20, 1953 (R. 1868-76), at which a memorandum was filed by Winans' attorneys of the work done by them, the total time involved being 853 hours (R. 1876). There was no attempt to segregate the services as between the defense

and the prosecution of the various claims. The memorandum listed services in "Legal research and preparation of legal memoranda," there being thirteen important subjects of research, none of which had any reference to the Winans' claim against the Parkers (R. 1875).

There was some discussion at the hearing respecting taxable costs and the Winans' attorneys pointed out that "Our action against the Parkers and Stegmann is a law action, and I assumed that costs would follow the judgment, and that action, of course, was against them" (R. 1870). The Title and Trust's case against the Winans was referred to as "an equity action" and "we would ordinarily be entitled to costs there." The judgment included costs to the Winans against both the Title Company and the Parkers (R. 149).

So we have here a case where parties to a lawsuit get their taxable costs and in addition thereto attorneys' fees for services in defending against the complaint and for prosecuting a crossclaim, in the same case.

There is no legal justification for any such judgment.

Both the Oregon statutory provisions and the Federal statute make it very clear that, except in very exceptional cases not involved here, or where a statute or contract authorizes it, a party to a lawsuit is not, as part of a judgment in that case, entitled to recover from the adverse party attorneys' fees for prosecuting or defending the case.

The Oregon statute on the subject reads as follows:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment or decree certain sums by way of indemnity for his attorney's fees in maintaining the action or suit, or defense thereto, which allowances are termed costs" ORS 20.010.

The amount of costs are set forth in ORS 20.070.

Under the above statute, it is well-settled that except when a statute or contract provides otherwise, the only indemnity for attorney's fees is these taxable costs. *Garrett v. Hunt,* 117 Or. 673, 245 P. 321, and cases therein cited.

In *Kellems v. California C.I.O. Council* (D.C. Cal.), 6 F.R.D. 358, Judge Goodman held that under a special California statute attorney's fees could be allowed the prevailing party in a libel action; and since the state law governed he gave judgment for attorney's fees. But he made it clear that, in the absence of such a special statute, attorney's fees, other than taxable costs, could not have been allowed, saying (at p. 360):

> "Attorneys' fees are not ordinarily allowable as costs in federal court actions at law (Maryland Casualty Co. v. United States, 4 Cir. 108 F. 2d 784), because of the settled practice, federal and state, to exclude them as such in the absence of a statute or rule specifically otherwise providing."

One of the cases cited in support of the above quotation was *Gold Dust Corporation v. Hoffenberg,* 87 F. 2d 451 (2d Cir.), from which we quote (p. 453):

> "Both in federal and state courts it is established in actions at law and almost uniformly settled in

> equity cases that counsel fees may not be recovered. Oelrichs v. Spain, supra. See Marks v. Leo Feist, Inc., supra. Exceptions are made if authorized by statute (see, for example, 1 N.J. Comp. Stat. 1910, p. 445, sec. 91; Diocese v. Toman [N.J. Ch.] 70 A. 881), as where costs are made recoverable in specific types of cases. This has been done as to actions brought to enforce orders of the Interstate Commerce Commission (49 U.S.C.A. sec. 16(2), or in suits for infringement of the Copyright Law (17 U.S.C.A. sec. 40), or in actions for violations of the anti-trust laws (15 U.S.C.A. sec. 15)."

The matter was also discussed in *Sprague v. Ticonic National Bank,* 307 U.S. 161, 167, and *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575, where the Supreme Court distinguished the general prevailing rule in the United States from the English practice. It held, however, in the first of the above two cases, that a party was entitled to attorney's fees in an equity suit in which a fund was recovered in a class action.

We have been able to discover no case like the present one in which attorney's fees, other than statutory costs, were allowed against opposing parties for services in the very case in which the services were performed because of alleged slanderous statements in the pleadings in that very case; and the authorities are uniformly opposed to any such allowance.

CONCLUSION

For any or all of the foregoing reasons, the judgment in favor of the Winans family against the Parkers should be reversed. The facts do not support the charge that in the conferences with the Title Company's attorneys the Parkers made any slanderous statements against the Winans. But if they had done so, the statements made during that conference were, as the Oregon decisions so clearly hold, subject to an absolute privilege. Furthermore, the inclusion of the Winans in the complaint was not the result of any statements made by the Parkers. Finally, the damages allowed—attorneys' fees in this case—would in no event be recoverable.

Respectfully submitted,

CAKE, JAUREGUY & HARDY,
Attorneys for Appellants,
Chet L. Parker and Lois M. Parker.

APPENDIX A

Testimony regarding alleged conversations between Paul Winans and Chet L. Parker on August 31, 1951, when Winans claimed he explained to Parker the Claim of the Government to the property. (See supra 17-8)

Testimony of Paul Winans (Tr. of R. 830-4):

"Q. Now, what was said between you and Mr. Parker during the whole course of the time you were together on that day, whether it was August 30th or 31st, when you were up on the survey party?

A. Well, Stegmann was driving his car, and my brother Ross rode in the front seat with him, and Mr. Parker and I and the son rode in the back seat, and there was continuous conversation over matters, as I remember it, wholly unrelated to this transaction or the survey on the way up to Lost Lake.

Q. Tell us just all of the conversation that occurred between you and Parker relative to the Lost Lake property on that day?

A. I think, *I can't say that there was any specific conversation until we got out onto the job,* and Mr. Parker was handling the compass, and I think my brother Ross driving the iron stakes, and Mr. Parker had this instrument which, I believe, is a staff compass, and was taking the bearings and directing the distances, or, rather, some of the others were handling the—it was not a log chain; it was perhaps a 100-foot tape. He was giving the bearings, and the others were taking distances

(Testimony of Paul Winans.)

to the bearing trees that he directed to be marked, and he was taking the notes of the bearings—

Q. What were the conversations between you and Mr. Parker about the property, if there were any?

A. *That did not come up for quite some time until after we were on the job,* and it was started by Mr. Stegmann. He brought it up in this way, sort of an off-hand remark or statement. He said, 'Well, you have title insurance on this property, don't you, Paul?' I said, 'We do, effective on Lot 1 only.' I told him that on the title insurance adjustment, as I had previously told him many times, it had been written off and that it was effective only on Lot 1, and I think I told him the amount of $2,000.

Q. All right. Now, just let me interrupt for a moment. While this conversation was going on were you and Parker and Stegmann all standing together?

A. Generally so throughout the day's work. There was some break-up.

Q. No, I am referring to this conversation you are just speaking about when Stegmann said that you have a title insurance policy on this.

A. Definitely so, we had to be together.

Q. That is what I am asking. A. Right.

Q. Now, whereabouts on the property were you?

A. Well, we were on this reserved area line because we did it while we were at work on it. Just the exact point I can't tell you now.

Q. Go ahead with what the conversation was about the property.

(Testimony of Paul Winans.)

A. Well, what it led into was just simply going over all that I had told Stegmann before generally around and including this discussion or explanation of the whole title picture which included the fact that we had had a title insurance adjustment, and I think I went further than that and set up the grounds, as I understood them, for the Government's claim to the property.

Q. You mean the fact that the government's survey had never been completed as to the 40-acre tract?

A. Well, further, I knew that I quoted the Supreme Court decision bearing on similar cases.

Q. All right. Did you advise—in the course of that conversation was the fact mentioned that you had written to Attorney Sever, Frank Sever, to attempt to get a private bill through Congress?

A. Definitely, I am sure of that.

Q. You told them at that time, did you, that you had paid all the taxes on the property? A. I did.

Q. For years and years?

The Court: Where was Mr. Parker standing with reference to where you and Mr. Stegmann were standing?

The Witness: It is a little difficult to say to that, but within very close earshot.

The Court: Did Mr. Parker participate in any of the conversation?

The Witness: Immediately following Stegmann's opening conversation Parker took over, and from there on the whole conversation practically was between myself and Mr. Parker.

(Testimony of Paul Winans.)

The Court: So you were telling Mr. Parker about a defect in the title and explaining what had been done, and Mr. Parker was answering you?

The Witness: I think he sort of led me on. He was very interested.

The Court: Go ahead.

Q. (By Mr. Strayer): Was the purchase of the property by Mr. Stegmann from you discussed between you and Mr. Parker in the course of that conversation?

A. I would say definitely yes.

Q. Was there some conversation about possible tax advantages that you might be able to make if you were to handle the purchase a little differently?

A. Yes, there had been. In the first place, Stegmann I think perhaps upon the second contract he had asked me if I wanted it all in cash and suggested that sometimes people would like to have it split between the two years so that not to have such a heavy tax load, and this was resumed a little later. It was following the title discussion.

Q. Did Mr. Parker discuss this tax question with you?

A. He certainly did. He led it.

Q. Did he make any recommendation to you?

A. He did." (Italics added)

Testimony of Ross Winans (Tr. of R. 1618-9):

"Q. I asked you when did you get acquainted with Parker, if you did meet him?

A. Well, that was later on towards, around, after the 30th or 31st of August when he came back to our place. I met them at the station.

(Testimony of Ross Winans.)

Q. Who did you meet at the station?

A. I met, I was acquainted with Walter Stegmann, but not yet with Mr. Parker nor his son. We rode together.

Q. Parker and his son showed up that day?

A. That is the first I had seen them.

Q. Did you go up to the lake with Stegmann and Parker and his son and Paul?

A. Yes, that is right.

Q. On that same day? A. Yes.

Q. Did you have any conversation with Mr. Parker on that day while you were up there on the ground?

A. Yes.

Q. Did you hear anything said regarding the title to the forty acres?

A. Yes, there was considerable said about it.

Q. What was said and by whom and to whom?

A. Well, much the same as what we had already gone over with Mr. Stegmann, that it was to be corrected, the title, through the Act, through our congressman and an Act of Congress.

Q. Did that involve the 25 acres too, that were bordering on the lake, or just the forty acres?

A. The back forty.

Q. Just the back forty."

(Tr. of R. 1626-7)

"Q. *You are sure the conversation took place on the road up to Lost Lake?* A. *It did.*

Q. Tell us what was said about the defect in the title on this trip, or, if anything about a defect was said.

(Testimony of Ross Winans.)

A. Well, they were to—Mr. Stegmann, especially, was the only one that I knew—was to know that we were not giving a warranty title to the back forty.

Q. Now, who said this, Mr. Stegmann, Paul Winans?

A. Paul Winans.

Q. Can you repeat his words?

A. He says, 'We are working on it through Senator Cordon to get the title cleared up through an Act of Congress.' Mr. Stegmann brought up Mr. Morse, then, and said that they were friends, he and his father were friends of Senator Morse and they could use Senator Morse.

Q. How did this subject come up?

A. Pardon?

Q. How did the subject come up in the conversation?

A. Well, along with the general talk about Lost Lake and about the property and how we had acquired it. I was with my father when he bought it.

Q. *Was that all you were talking about all the way* up?

A. Not necessarily. It was other—touched on other things, politics.

Q. Give us your conversation while on the way up?

A. Politics and jokes."

(Tr. of R. 1628-9)

"The Court: All right, Mr. Winans, try to give him a play-by-play description of what happened after you got in the car.

The Witness: Yes. Well, after Paul mentioned that we were endeavoring to get the title cleared on the

(Testimony of Ross Winans.)

back forty and, as said a moment ago, he referred then to Senator Morse, and maybe we talked about that for a little while, talked about politics, talked about the weather, possibly, and conditions of the road, and met a log truck and changed the conversation, and then back again to the property."

(Tr. of R. 1630-1)

"A. It is this, that Paul says, 'We will get Senator Cordon and ask him if he is already working on it to get an Act of Congress to clear up that back forty.' And Mr. Stegmann says, 'We will work through our friend, Senator Morse.'

Q. Did your brother Paul tell him *in your presence on the trip* that the Government claimed ownership of that Lot 2 of the forty-acre tract?

A. As near as I can remember, yes.

Q. What was the nature of the defect in that title to Lot 2, not what the real nature of it—what did your brother Paul tell him was the difficulty with that title?

A. Other than the Government claimed that as it was not surveyed, the State gave title to it to Macrum and through Macrum to my father.

Q. Was there any discussion relative to a claim having been made to Pacific Abstract & Title Company some years previous? Was that discussed?

A. That I couldn't say.

The Court: Well, I did the best I could, but is there anything else you would like to ask him with reference to that?

(Testimony of Ross Winans.)

Cross-Examination

(Continued)

By Mr. Ryan:

"Q. Was it your understanding that you people had a good title to that; that you had a right to that property? A. We had a warranty deed.

Q. *You felt at the time that you had a right to that property?* A. *Yes.*" (Italics added)

(Tr. of R. 1639-42)

"Q. You say that when you were going up there to the lake on August 11th with your brother and Walt Stegmann that nobody mentioned the fact that you theretofore had collected from the Pacific Abstract & Title Company on a title policy? A. No.

Q. At any other time— A. No, sir.

Q. At any other time did you ever hear your brother Paul tell any of the parties that we have been talking about the title policy that you had with Pacific Abstract? A. Never.

Q. You never heard him say that he had a title policy?

A. Yes, I understood that at one time.

Q. No, I don't mean—I will have to correct myself—I made a mistake. I didn't mean to say that you ever heard it. I mean did you ever hear him say anything about a title policy to Walt Stegmann? A. No.

Q. Or to Chet Parker? A. No.

Q. Or tell them that he had collected money on a title policy? A. No, sir.

Q. You knew that the money had been collected on

(Testimony of Ross Winans.)

the policy? A. Yes.

Q. You are saying that with some hesitancy as though you are not sure.

A. Not necessarily, no.

Q. No, that is, you mean—

A. Nothing that I should not hesitate on.

Q. Now, I say you are sure; you knew about it?

A. Yes.

Q. Very well. You were with the boy quite a lot that day on the 31st day of August; were you not?

A. Well, pretty much. On the trip up there and back we got quite friendly.

Q. And you had a deal on a bear skin?

A. Now, that is very common.

Q. Now, whereabouts was it on that day where you say your brother was telling Chet Parker about trying to get this Act through Congress? Where was that, in the car up there? A. Yes.

Q. *In the car on the way up?* A. *Yes, sir.*

Q. *So they didn't discuss that after they got up there, as far as you know?*

A. *Not to my knowledge, and I was with them practically all the while out there.* When they went to lunch, that I wouldn't know, was to themselves.

Q. When your brother was telling Chet Parker on the way up there about getting this Act through Congress, was he a Cordon supporter or a Morse supporter? Did he feel that Cordon was the man to do it or Morse was the man to do it?

A. Not necessarily. He had some work through the

(Testimony of Ross Winans.)

attorneys, Cordon, I believe, and his attorneys were connected, that is all. Brother Paul evidently kind of liked that Cordon.

The Court: Mr. Jaureguy, I thought that this was a conversation with Mr. Stegmann and not with Mr. Parker.

Mr. Jaureguy: We have left that and come to another one. We were talking about the Stegmann conversation a little while ago. Now he is on the way up in the car; is that correct; am I guoting you right that on the 31st of August on the way up to Lost Lake in the car your brother told Chet Parker about trying to get this Act through Congress?

A. Well, it came up, well, he didn't necessarily tell him, but it was talked along with other discussions.

Q. Who was in the car besides you and your brother and Chet Parker?

A. Well, Stegmann was driving. I was in the front seat with Walter. Chet and his son was in the rear seat with Paul.

Q. Were the five of you in the car going up?

A. That is correct." (Italics added.)

Testimony of Chet L. Parker:

(Tr. of R. 292)

"Q. All right. Let's get on down, then, to the 30th, which, I believe, was the day that you went into the title office and ordered a purchaser's policy, was it not, or was it ordered before that?

A. No, I think it is—my diary says it is on the 30th, and I am referring to my diary. I certainly could not re-

(Testimony of Chet L. Parker.)

call that date out of memory."

(Tr. of R. 293)

"Q. All right. Then, on the following day your diary indicates that you and Walter Stegmann and your son, Myron, Paul Winans, Ross Winans all went to Lost Lake to set out that 8.8 acres. Now, I wish you would tell us about that trip, Mr. Parker.

A. Well, we drove all in the same car. I believe it was my car, but I am not sure—from Winans' office to Lost Lake, and we cut some brush and pulled a tape around in the brush, measured a little land. Mr. Stegmann took a lot of notes, and that's about all. We went back home."

(Tr. of R. 293-5)

"Q. Then on the 31st you were up there, and you were helping in the survey of this reserved area, were you, or was that the survey of the tracts themselves.?

A. No. I was helping Walt survey the—I really don't know what we was surveying. We was running around there cutting brush, pulling a tape through the brush. I guess we were surveying the excluded area or attempting part of it or something.

Q. Now, did you have any discussion with Mr. Winans on that day about anything.

A. Yes, about the amount of acres.

Q. Anything else?

A. Well, he wanted all the lake frontage.

Q. You had an argument about that particular area that would be reserved to him; is that right.

A. Sure; he was getting everything but a hundred

(Testimony of Chet L. Parker.)

feet of lake frontage, and I thought to myself I would like to have a little more than a hundred feet left of lake frontage. I remember having a violent argument. No one engaged in fisticuffs exactly, but I won't deny that I wanted to.

Q. That is the only thing that you can recall discussing with Mr. Winans on that day?

A. Well, we made a discussion, and finally he said I could have—he would be very generous with me, would give me three or four hundred feet of frontage, and he would take fourteen or fifteen hundred feet and any other additional property would be had into the acre. I believe we sat down and figured out that at that time.

Q. Well, I note that your diary says you got back to Hood River too late that evening to get your title policy, and on the following day, on September 1st you and your wife went to McMinnville to see some timber on Pea Vine so I take it that is where the Labor Day week end came in which resulted in your not getting the policy until the following week; am I right on that Mr. Parker?

A. Well, I suppose yes."

(Tr. of R. 480-1)

"Q. Tell us where and under what circumstances you met any of the Winans on the 31st of August?

A. Well, Walt was going to go up and survey the lines, and we were supposed to help.

Q. Who is 'We'?

A. Oh, Paul and I and Ross and my son. As I

(Testimony of Chet L. Parker.)

remember, we went up to the lake, and I believe in my car, but I am not sure whose car it was. It possibly was mine, because most people want to wear out mine instead of theirs, and we worked that day.

Q. What did you do?

A. Well, we was surveying, cutting brush.

Q. What were you surveying?

A. Well, I really don't know. We were supposed to be surveying some land, I guess.

Q. I assume that, but were you trying to survey the 40-acre tract, or were you surveying some part of the entire tract?

A. We was working next to the lake. As I remember, Mr. Stegmann started at the edge of the lake, and we kept running funny lines around trying—as far as I was concerned, I wanted all the timber. I didn't care about anything else, but I wanted the trees."

(Tr. of R. 482)

"Was there anything said by Mr. Ross Winans or Paul Winans regarding title to any part of that property that you were working on?

A. To me?

Q. Well, to you or in your presence?

A. Not that I heard, no."

(Tr. of R. 487-8)

"Q. The dates I am concerned with, Mr. Parker, are from the 17th of August on because that is the first time you said you talked to Paul Winans or any of the Winans. From the 17th of August on to the time that you got your deed and paid your money was there—did

(Testimony of Chet L. Parker.)

you have any telephone conversation with Paul Winans or any of the Winans relating to the ownership, the title of the Lost Lake property?

A. No, I don't remember of having anything to do with specifically the title of the property, any more discussion, other than that night of the 18th, if that was the night I was there, which I presume it was."

(Tr. of R. 491)

"Q. (By Mr. Krause): At any rate, you and these other four people—that is, your son and the two Winans and Stegmann—were up there surveying on one occasion, were you not?

A. Yes, I think that is all that was present.

Q. That is all that were present?

A. I think that is all that were present.

Q. Mr. Parker, isn't it a fact that upon that occasion Paul Winans told you of the claim of the United States against the 40-acre tract.

A. I think I have answered that already. He did not."

(Tr. of R. 492)

"Q. (By Mr. Krause): At any rate, you are sure of that, Mr. Parker, that while you men were up there engaged in this surveying operation Mr. Paul Winans did not tell you that the United States claimed ownership of the 40-acre tract?

A. No, I remember—if he did, I certainly would have remembered it."

(Tr. of R. 493)

"Q. Mr. Parker, did Mr. Paul Winans on that same occasion when you five men were up there on the prop-

(Testimony of Chet L. Parker.)

erty engaged in surveying the reserved area tell you that a title policy which he had had on the 40-acre tract as well as the 25-acre tract, that he had been paid $3,000 in settlement because of the Government's claim against the 40-acre tract.

A. No, I never heard anything about any $3,000 settlement.

Q. Did you hear anything about any kind of a settlement of that policy?

A. No, I never heard anything about a settlement of any policy."

Testimony of Walter Stegmann
(Tr. of R. 735-6)

"Q. Was there any discussion while you were up on the Lost Lake property on that day as to the, as to what steps would be necessary to get a title to the 40 acres?

A. I know of no discussion.

Q. Were there any discussions regarding income taxes?

A. There seemed to be quite some discussion between Mr. Parker and Winans. They would—at different times when I would be surveying and laying out the piece of property, why then, it was not right, and then I would go back and do it over again, and it seemed like the amount of acreage—they were sitting down there on the bridge or having quite a—I don't know, it seemed like it would have been a heated argument there about—their figures didn't agree on the acreage.

Q. By 'their figures' you mean Parker's?

A. Parker's and Winans'.

(Testimony of Walter Stegmann.)

Q. Parker's and Winans' figures?

A. And I didn't have too—hear their conversation because I would pass by them sometimes, and sometimes I would be quite near for a few minutes, and then I would be quite some distance from them.

Q. Well, there were discussions regarding the reserved area, but my present one, did you hear anything regarding income taxes?

A. There might have—yes, I believe there was some. I am sure that at noon when we were eating lunch by the park there may have been some discussion about income tax.

Q. Was there anything said about a claim having been made by Ethel Winans against the Pacifiic Abstract Title Company because of the condition of the title on the 40 acres?

A. None that I know of.

Q. You didn't hear about it? A. No."

(Tr. of R. 1544-6)

"Q. Now, on August 31st, on the day where there has been some testimony here that you and Mr. Winans and Ross Winans and Chet Parker and Myron Parker were on the Lost Lake area premises, do you recall that day?

A. You mean when Chet Parker and Myron Parker and Paul Winans and Ross Winans and myself were up there?

Q. Yes.

A. You say that was the 31st of August?

Q. Yes, according to the testimony.

(Testimony of Walter Stegmann.)

A. I don't know the exact date, but I am sure, though, that that was the exact day when the reserved area was finished, and that we went up there to agree on the reserved property and set stakes out and mark the trees and to conclude this reserved area.

Q. Do you recall overhearing any conversations or being present at any conversations between Paul Winans and Chet Parker on that day?

A. Well, I don't—I wasn't present, I don't believe, at any conversation, only that surveying these lines, why, maybe I would be, pass by him, or walking along the trails, you know, this line, why, I might pass by him, or everybody seemed to be doing a little bit of helping in the surveying, and that I remember the one time when I was close by they were having a discussion, a heated discussion there in the trail. They were—I don't know whether they were arriving at the volume or acreage or what they were discussing, but they seemed to be having quite a discussion there.

Q. With respect to the reserved area, were you being consulted by Mr. Winans as to the parts to be reserved in that survey?

A. How did you mean that exactly?

Q. Mr. Winans, when you would be running a line attempting to determine just what area would be reserved, was Mr. Winans dealing with you?

A. Dealing with me?

Q. Yes, was he talking with you about it?

A. No, he wasn't dealing with me, but sometimes he may have mentioned when I was running the lines,

(Testimony of Walter Stegmann.)

which it was my job to do, run the lines, and he was wondering if we went up a little farther with the line what it would look like, and we had quite a time deciding. I couldn't tell where they wanted to go. I would survey up one line, and then it seemed like him and Mr. Parker would change their mind, and then I would come back and we would start over on another angle.

Q. You said he and Mr. Parker would change their minds?

A. Well, it seemed like it.

Q. Were Mr. Parker and Mr. Winans consulting together to reach a decision regarding the reserved area?

A. They had been doing quite a bit of talking. What they were talking about I wasn't able to hear.

Q. Why would you say they changed their minds?

A. Well, I guess they changed their minds because I surveyed a little ways, would measure up, and we would set some stakes, and then we would come back and change it, so evidently it was not right, because I had to do it over again.

Q. At the conclusion of this day, had the reserved area been staked out?

A. At the end of this day, yes, they finally agreed on a reserved area there where—it was staked out.

Q. Was there any discussion in your presence to yourself or by anyone else, by Mr. Paul Winans regarding the state of the title to this property?

A. Well, I didn't hear any discussion on it at all. I mean regarding the state of the title."

APPENDIX B

Testimony of various witnesses on whether Chet Parker was with Paul Winans, the evening of August 18, 1951. (See supra, 46-8)

Testimony of Chet L. Parker.
(Tr. of R. 264-6)

"Q. Did you have any arrangement about notifying Mr. Winans of this intended meeting on the 18th?

A. Well, it seems to me that Mr. Stegmann was going to do some surveying in a day or two—or the day of the 18th, and that he would tell Mr. Winans, as I remember it.

Q. Stegmann was to tell Mr. Winans that you would meet on the 18th, the evening of the 18th?

A. Well, now, I am not positive about it, but I think that is the way it was.

Q. Well, do you recall something of that kind?

A. Well, it certainly is not very fresh in my memory.

Q. Well, did you go there and meet with Mr. Stegmann and Mr. Winans?

A. Well, I didn't go—I went purposely to meet and see that that deal, the election to purchase, was already completed.

Q. You did see Mr. Winans that night?

A. Yes.

Q. Mr. Paul Winans? A. Yes.

Q. At his office in Hood River?

A. No, not at Hood River.

Q. Oh, Dee, is it?

(Testimony of Chet L. Parker.)

A. Well he has got an office there.

Q. What is that?

A. He has got an office, and he is not either at Dee or Hood River.

Q. Just where is it?

A. Well, it is in between both places.

Q. At any rate, that is where you met?

A. Yes.

Q. Was that the first time that you had ever met Mr. Winans?

A. To my recollection, yes.

Q. Were you introduced to him at that time?

A. Yes.

Q. Who introduced you?

A. I believe, well, either myself—I believe I introduced myself.

Q. Who was present there when you came in?

A. In the office itself?

Q. Yes.

A. Well, it seemed that Walt was there, Walt Stegmann, and another person and Paul Winans.

Q. Who was the other person?

A. I don't know.

Q. Were you introduced to him?

A. I don't believe so.

Q. It was a man, I take it?

A. Yes, I think a man, maybe a woman.

Q. Were you by yourself that day?

A. I think I was, yes, but I am not sure.

Q. Is there anything in your diary to indicate that

(Testimony of Chet L. Parker.)

anyone was with you? A. No.

Q. That, then, is your first meeting, to your knowledge, with Mr. Paul Winans? A. Yes.

Q. Had you ever talked with him before?

A. In person?

Q. Either in person or by telephone.

A. I don't think I did, but I might have.

Q. Well, do you have any recollection of a telephone call before that time?

A. Well, I have a recollection of a telephone call, and I do not know that it was a day or two before the 18th or a day or two afterwards, or what time it was."

(Tr. of R. 275-80)

"Q. Well, now, going back to your meeting on August 18th, the evening of August 18th, at Paul Winans' home, will you just take us right through that meeting and tell us everything that happened then?

* * * * *

The Witness: I was there not very long, for a long length of time. It would be purely a guess, but it would seem like maybe an hour or less. I really don't remember vividly anything other than what kind of a deal I was going to get for this property. I was interested in it because from the instruments I had or the papers I had from Mr. Stegmann it did not indicate that I would get either a title insurance policy or an abstract, and I was very interested in which one I would get because I certainly would have to have one or the other, and I preferred, of course, a title policy. Mr. Winans told me and pointed out to me that his instruments did not call

(Testimony of Chet L. Parker.)

for him paying for a title policy, and if I wanted one I would have to pay for it myself, and that is about the extent—oh, there was something about surveying, Mr. Stegmann would be doing the surveying, and from there on he would be dealing with me.

Q. What?

A. That Mr. Stegmann would be doing the surveying of the property from then on, and he would be dealing with me from then on to finish paying for it, and that is about—oh there was some—then I left alone, if I was alone, and I am sure I was. At least, I left his office alone. No one else went in with me to his office.

Q. Your recollection is that you were there about an hour?

A. Well, it wasn't over that long if shorter.

Q. When you arrived Mr. Stegmann was already there?

A. Yes, I am sure he was.

Q. When you left was Mr. Stegmann there?

A. That I am not sure about.

Q. What is your best recollection as to whether you left first or Stegmann left first?

A. I would not, absolutely would not know which one left first.

Q. You haven't anything that you can refer to to refresh your memory on that?

A. No, that—

The Court: I did not fully understand that testimony with reference to the title insurance or abstract. Would you mind reading that testimony?

(Testimony of Chet L. Parker.)

(Testimony referred to was read by the Reporter.)

Q. (By Mr. Strayer): Mr. Parker, on the subject of who left first I have here a copy of your deposition which was taken on August 7, 1952. Do you recall the occasion of your deposition?

The Court: Do we have copies of those depositions?

Mr. Strayer: Yes.

The Court: Under the practice here the witness is entitled to see the deposition.

Mr. Buell: That is Exhibit 22.

Q. (By Mr. Strayer): Were you not asked this question, Mr. Parker, and did you not give this answer on your deposition:

'Q. Stegmann left ahead of you that evening?

'A. I think he left ahead, but I am not sure.'

* * * * *

Mr. Strayer: I am trying to refresh his memory, your Honor. I am not trying to impeach him.

The Witness: Well, it is not as fresh now as it was when this deposition was taken. This has been some time ago, too. It is more hazy than ever in going over the recurrence of the event. Normally, when I purchase a piece of timber I don't make a note that I left before Bill Jones or John Doe, or my own memory or otherwise, and I don't remember whether he left first or afterwards, but I believe I left first. I am still thinking maybe I might have left first.

Q. (By Mr. Strayer): You think now that you may have left first. I beg your pardon. You thought when this deposition was taken that you left first?

(Testimony of Chet L. Parker.)

A. Yes—

Q. No, no; the other way around; you thought when the deposition was taken that he left before you did, and you are now—your best recollection is that you left first?

A. Well, we didn't leave together.

Q. I know, but that is not the question.

A. Well, I am sorry; I can't say whether we left first, last, or when he left.

Q. All right. Now, what conversation took place regarding this notice of election to purchase, Mr. Parker?

* * * * *

Q. (By Mr. Strayer): You have before you Exhibit 26, which I understand from your counsel is a copy of Notice of Election to Purchase which you delivered to him at his request; is that right, Mr. Parker? You delivered it to Mr. Jaureguy at his request?

A. Yes, I think so.

Q. Yes, and what is that document?

A. Well, it says election, Notice of Election to Purchase.

Q. Is that the copy that you took away from the meeting on August 18th? A. Yes.

Q. All right. Now, tell us about the conversation regarding the signing of that notice?

A. Well, I was not there when it was signed.

Q. It had already been signed when you arrived, you mean?

A. I am pretty sure it was signed when I arrived. I am not real sure about it, but I think it was.

(Testimony of Chet L. Parker.)

Q. You think it had already been signed when you arrived?

A. I think it was."

(Tr. of R. 284-5)

"Q. When you were first talking with Mr. Winans did you tell him that you had brought out Mr. Stegmann?

A. I told him from now on he was dealing with me.

Q. How did that conversation arise?

A. I was there doing business. I wanted to know about the deal, whether Stegmann paid the $4,000 or not.

Q. What did you say to Mr. Winans when you walked in? You shook hands with him, I assume, told him you were Chet Parker?

A. I don't know axactly the exact words I said or the exact moment I said them. It is not vivid in my memory.

Q. Well, did you say, in effect, that you were there to close up the deal for the purchase of the property?

A. Not to close the deal but that Mr. Stegmann would be out of the deal from now on. It would be Chet Parker he would be dealing with. Mr. Stegmann would be surveying and anything to do with the set-out area, why, he would have to do it.

Q. Did Mr. Winans appear to be surprised that you had an interest in it?

A. Well, I don't know whether he was surprised or not.

Q. Had the $4,000 been paid at the time you arrived?

A. You mean the check given?

(Testimony of Chet L. Parker.)

Q. Yes.

A. I believe it was, but I am not sure.

Q. Do you recall any discussion about the payment at this meeting?

A. No; no, I don't."

(Tr. of R. 344-6)

"Q. (By Mr. Strayer): All right. Now, if you will refer to page 21 and to 41 of the deposition with reference to your—I believe this refers to your talk with Mr. Winans on the 18th of August and particularly your testimony with reference to discussions with Paul Winans on title insurance:

'Q. But the first time this discussion of title insurance came up between you and Paul Winans was that particular evening? A. Yes.

'Q. That is when you asked him to furnish title insurance?

'A. I asked him, yes, what he was going to do for the title. He told me—

'Q. And it was after that when he refused to do anything, you decided you had better do it yourself?

'A. That is right. I told him I didn't want an abstract on it; I would have to go buy some title insurance, then. He told me it was the Hood River office, the title insurance.

'Q. So when after that you decided to get some title insurance and to go and do it on your own?

'A. I decided to get a title report first, to see that he owned it or someone owned it that was trying to work the deal. Then I decided, after talk-

(Testimony of Chet L. Parker.)

ing to the attorney, that I could purchase title insurance. Up to then I didn't even know I could purchase title insurance.'

Q. Do you remember having given that testimony, Mr. Parker? A. Yes.

Q. Am I correct in my interpretation? Apparently, when you gave your deposition, you were then under the impression that you had not yet ordered a title report at the time that you talked with Paul Winans?

A. Well, I knew I had ordered a title report. I was a little confused no doubt, between the purchaser's policy and the title report.

Q. You did on that occasion ask Mr. Winans to furnish you with title insurance, did you?

A. Yes, and he indicated—well, he said he would give me an abstract. I told him I would rather have title insurance, and he indicated to me that if I wanted title insurance I would pay for it, he wouldn't; that any of his instruments, they call for payment of any title insurance.

Q. You were willing to pay for the title insurance?

A. Well—

Q. Well, you told Winans you were?

A. Well, I was forced to then from then on.

Q. What is that?

A. If I was going to get any, he told me I would have to pay for it.

Q. Did you tell him you would pay for it?

A. Yes I believe I told him I would pay for the additional amount. He had an $8,000 policy to turn in

(Testimony of Chet L. Parker.)

on it. I would pay for the additional amount.

Q. You told him you would pay additional, which meant that Mr. Winans would not be out anything for title insurance; is that it? A. That's right.

Q. Well, then, you really had no problem of getting title insurance, a title insurance policy, as long as you were willing to pay for it, did you?

A. Yes, I had a problem. I didn't even know I could get a purchaser's policy until I had it in my name.

Q. Why were you interested in a purchaser's policy?

A. Because when I buy property I like to have a good deed for it so it can be recorded, and then I can order an abstract or I have a policy of title insurance."

(Tr. of R. 348)

"Q. You do not remember Mr. Winans making any representation, as to what kind of title he had, do you?

A. Well, he had title insurance on it. I don't know what; I don't know what—when you say title insurance, I don't know what you mean by title.

Q. I mean did he claim to be the owner of the property?

A. That assignment indicated to me he was the owner of the property.

Q. That was not the question, though. Did Mr. Winans make any statement to you as to who owned the property?

A. Well I think he did, but I am not real sure.

Q. What is your best recollection as to what he did say about it?

A. Well, there was a discussion concerning the title

(Testimony of Chet L. Parker.)
policy, who was going to pay for it and that he had—that there was a title policy now in existence on it of the total amount of $8,000, as I remember."

Testimony of Walter Stegmann
(Tr. of R. 718-19)

"Q. Was there any such discussion at any time in your presence?

A. There might have been, yes. I believe there was. It seems like it was on August 18th that—in the evening of August 18th. Let's see, I think it was about dusk Mr. Parker come up there, and they were having some discussion on who was going to do what, but I didn't, had nothing to do with it.

Q. They were having a discussion about who was going to do what?

A. They were having a discussion on the, who was going to furnish—it seems like he was going to furnish an abstract because he already had a title policy or something like that.

Q. By 'he' you mean Winans?

A. Winans, he said that they would probably furnish an abstract, but they already had a title policy, and he, I think, attempted, Mr. Winans did, to look for that title policy that same evening.

Q. You had him looking for the title policy earlier than that, too, didn't you, in your talks?

A. I didn't have him looking for it, but he did it on his own by looking for it to get the description of the property.

Q. Is this the second occasion that he was looking

(Testimony of Walter Stegmann.)

for the title policy? A. Yes.

Q. The first time he was looking for it to get the description off of it? A. Yes.

Q. And now he was looking for it in order to show it to Mr. Parker?

A. I believe that is what he was doing."

(Tr. of R. 1535-6)

"Q. Now, on this previous testimony as brought out here that you people were up there right until evening on the 18th of August—

A. It must have been probably close to four or five, I don't know, something like that, around five o'clock.

Q. Then you returned down to the gas station near Dee, Oregon?

A. Yes, we went back to his little office there at Dee, or it is across from his place there.

Q. Did the surveyors come down with you, or did they come down in a separate vehicle?

A. They drove up in a separate car, and they drove their own car back that evening.

Q. Did Carl Stegmann come down with you?

A. Yes, he come down. We, I am sure it was him, Carl Stegmann, Paul Winans, and myself that drove down in his car, and the surveyors, they come down in their other car ahead of us or just following us.

Q. You say you are sure it was him, Carl Stegmann, yourself and some other party?

A. I meant him, I meant Carl Stegmann. I said 'him' first. I meant Carl Stegmann, Paul Winans and myself were in this car that we drove back from Lost Lake to

(Testimony of Walter Stegmann.)

Paul Winans' place.

Q. Would you tell us what took place at Paul Winans' gas station there in Dee?

A. Well, yes, there was—the two surveyors, they wanted to hurry and leave and get back to Portland and they were doing some figuring there. They were figuring outside, I think on their car, and kind of comparing. Well, they had a few notes they were figuring and comparing, a few notes. They were figuring up the time or the hours they worked there, and Mr. Paul Winans was preparing to pay them off so that they could get started towards Portland, and I think he said that he had finished typing up a piece of paper before him and I could get on with our business and that he paid the surveyors off and they left."

(Tr. of R. 1537)

"Q. Did Mr. Chet L. Parker show up that evening?

A. Yes, he showed up there just about the time, I believe that—it was a little while after, I believe, the surveyors had left and Paul Winans was typing up that election to purchase and the extension of time for setting up this reserved area, and Mr. Parker come up there."

(Tr. of R. 1538-40)

"Q. At the time this was being typed out, had Mr. Parker come there, before the typing of the document, the Election to Purchase, had been typed out; do you remember?

A. Well, I don't remember exactly, but he might have come just about the time it was finished. I don't know, or I think he come after it was finished, typed out.

* * * * *

(Testimony of Walter Stegmann.)

Q. Can you recall any conversation regarding Mr. Parker's interest in the option when this question of the Election to Purchase was offered to you?

A. Well, I remember telling—what was that question again?

Q. Do you have any memory of any conversation regarding Mr. Parker's interest in the option at this time you have spoken about earlier in the—

A. I had spoken about it earlier, and I am sure I mentioned it at the time he was typing this up, and I didn't really think it was necessary for me to sign it. I thought it might have been part of the option, but I agreed on the extension of time, and I think it might have been that time that Mr. Parker come in and it was explained—Mr. Parker was introduced, or he introduced himself, and he could see no reason for signing it, and that him and Mr. Winans were dealing from then on. That was the understanding.

Q. Who said that?

A. Mr. Parker and Mr. Winans were dealing from then on.

Q. No, but I mean, were those words used?

A. What?

Q. Mr. Parker and Mr. Winans were dealing from then on, did Mr. Parker say that to Mr. Winans, or did you say that, or how—

A. Well, I told Mr. Winans that I had sold my option to Mr. Parker; that him and Mr. Parker were then dealing. Then I think probably when Mr. Parker come in there and was introduced or introduced himself that

(Testimony of Walter Stegmann.)

I said, 'This Mr. Parker is the one that bought the option, and you and him are dealing from now on.' I mean, I am not sure that that is the words, but I think—"

Testimony of Carl Stegmann

(Tr. of R. 1250-2)

"Q. Are you acquainted with Chet Parker?

A. Yes.

Q. How long have you known Chet Parker?

A. Oh, a couple of years, I suppose.

Q. Have you ever met Mr. Paul Winans?

A. I seen him one time, yes.

Q. At one time? A. Yes.

Q. When was that?

A. Well, that was in August last year, it was.

Q. August, 1952?

A. I believe it was, or '51. I am not sure.

Q. '51? A. '51.

Q. Do you remember the day in August that it was?

A. Well, not exactly. It was about the middle of August.

Q. Would you say it might have been August 18th? There has been testimony here that it was.

A. It probably could have been, yes.

Q. Where was it that you saw him?

A. Well, it was at his place the first time I seen him.

Q. Who else was there?

A. Well, I was with my brother.

Q. Did you go any place that day with Mr. Winans?

A. Well, we went up to, first up there at Lost Lake.

(Testimony of Carl Stegmann.)

Q. Did anybody go with you?

A. Well, I was with my brother and Mr. Winans.

Q. Was there anybody else went up?

A. No, not we—

Q. Well, I want to ask whether there weren't two men from Portland, surveyors, went up?

A. Well, they was in a different car.

Q. They were in a different car? A. Yes.

Q. But you and Mr. Winans and your brother, then, went up in his car, and then somebody went up in another car? A. That is right.

Q. How many were there in the other car?

A. Two.

Q. Were they surveyors?

A. They seemed to be. That is what they was up there for.

Q. Did they do surveying work up there at Lost Lake?

A. Well, yes, they were running lines around a piece of property up there.

Q. Then when you got through, did the five of you go back to the Winans place?

A. Yes, that is right.

Q. At any time did you see Chet Parker.

A. Yes, he was up there.

Q. Just tell us when and where you saw him?

A. Well, these surveyors was—there was kind of an office up there, and these surveyors had their car parked outside, and I was out there talking with them, and Mr. Parker pulled up on the other side of the road and got

(Testimony of Carl Stegmann.)

out of his car, walked across the road, and talked to me because I had seen him before, knowed him slightly before that. I knew who he was, and he went on in to the office, and shortly afterwards, well, him and my brother and Mr. Winans were inside, and then they came back out, and I don't know what they were talking about, but that is about all.

Q. When Chet Parker went in the office, were the two surveyors still there, or had they gone, if you remember?

A. They left about that time.

Q. They left about that time?

A. It has been quite a while ago. I just don't quite remember. They left about that time.

Q. You say you do not know what Chet Parker, Mr. Winans and your brother were talking about when they were inside?

A. No, I do not. I never paid any attention to their business. I didn't have any interest in it, and I never paid any attention to what they were talking about."

(Tr. of R. 1259-60)

"Q. While you were there at Mr. Winans' place, you were either wandering around, you say, or standing there talking to the surveyors?

A. That is right.

Q. Were the surveyors still there when you left the place?

A. No. I believe they had left before we did.

Q. You believe they had gone?

A. I believe they had gone.

(Testimony of Carl Stegmann.)

Q. When did you leave?

A. Well, shortly after Mr. Parker got there.

Q. You did not leave by yourself? A. No.

Q. Shortly after Mr. Parker got there you and your brother left? A. That is right.

* * * * *

Q. When you left up there at the Winans place, Chet Parker was still there was he?

A. Well, now, I don't really remember whether he was still there or not. It seems to me like somebody drove up on the road. Now, there were several cars parked there and I don't know whether he left right then or whether he was still there. I believe he was still there. I rightly wouldn't swear to that.

Q. This one day is the only day that you were ever up there in that Hood River area; is that right?

A. That is right."

(Tr. of R. 1264-5)

"Q. Were you with them when Mr. Parker drove up?

A. Yes, I was standing right by the car.

Q. Were you talking to them at the time?

A. I was talking to the surveyors at the time.

Q. How close to the car did Mr. Parker come?

A. Oh, I would say 20, 30 feet.

Q. He walked on into the service station?

A. That is right.

Q. Did you watch to see what they seemed to be doing in the service station?

A. No, I did not.

Q. I take it your brother Walter was in there at the

(Testimony of Carl Stegmann.)

time? A. Yes, he was.

Q. Then later he came out before Mr. Parker, didn't he?

A. Well, let's see, I believe they all come out about the same time. That I don't really know.

Q. Which one of you drove away first? Was Mr. Parker's car still there when you and brother left?

A. Yes, it was, I believe.

Q. Were the surveyors still there when you left?

A. No, they had left before we did.

Q. Oh, the surveyors left before you and Walter Stegmann?

A. That is right. I believe they did."

Testimony of Paul Winans

(Tr. of R. 819-20)

"Q. Had you received any telephone calls prior to August 18th from any man or identifying himself over the phone as a Mr. Chet Parker?

A. Definitely no.

Q. Did Mr. Parker, who is sitting here behind Mr. Jaureguy, did he appear at any time during the course of your meeting with Stegmann there in the service station on Lost Lake, on the evening of August 13th?

A. He did not.

Q. Or on the 18th? A. He did not.

The Court: On the whole day of August 18th. How about at any time August 18th?

The Witness: Not at any time, your Honor."

(Testimony of Paul Winans.)
(Tr. of R. 902)

"Q. Now, as I understand it, your testimony is that on August 18th, the day that the option was exercised, you did not see Chet Parker?

A. I did not see Chet Parker.

Q. And you say that he did not tell you that from then on you should be dealing with him as he had purchased the option?

A. No, he definitely did not tell me that.

Q. You will say that you did not ask him what he expected, an abstract or title insurance?

A. No, I didn't even see the man. It could not have been.

Q. You will say that you did not tell him that he could not have any title insurance? If he wanted it, he would have to buy it himself?

A. No; definitely not, at any time.

Q. You will say that you did not, on the 18th of August, in his presence, look for your report or pretend to look for your policy of insurance?

A. Most certainly not."

Testimony of Retlaw Haynes
(Tr. of R. 1041-4)

"Q. Would you tell us about when you got down from Lost Lake back to Dee where Mr. Winans' home was, just roughly now.

A. Well, I guess around six o'clock.

Q. You had surveyed up there as long as you were able to see in the trees? A. Yes, sir.

Q. And then drove down. Now, did Stegmann and

(Testimony of Retlaw Haynes.)

this man that was with Stegmann and the rest of you all come down at the same time? A. Yes.

Q. All right, now, tell us what Mr. Winans and Stegmann were doing after they got down to Mr. Winans' place?

A. Well, I don't know what they were doing because Paul asked us to wait outside while he finished some business.

Q. Then that is what you were doing, you were waiting outside, and they were in a little service station building, weren't they? A. Yes.

Q. They were in, evidently to transact some business while they were in there?

A. That is what I understood they were doing.

Q. Well, did you see them handling any papers while they were in there?

A. No, I wasn't looking in the window. I was sitting out there waiting.

Q. You were sitting outside waiting for Winans, weren't you? A. Yes.

Q. At any rate, the two of them were conferring in there for about how long?

A. Well, as I remember, about half an hour.

Q. Was it impressed upon your memory for any particular reason that this did occur, Mr. Haynes?

A. Yes.

Q. Well, give us the reason that it impressed on your memory.

A. Well, I was pretty disgusted with having to wait because I was anxious to get home, and Mrs. Winans

(Testimony of Retlaw Haynes.)
brought us over some cool drink to drink while we were waiting.

Q. You were still going to drive back to Portland that night? A. Yes.

Q. You had been rather impatient about the delay?

A. That's right; that's right.

Q. But you were waiting there to receive your compensation? A. Yes.

Q. Would you tell us what happened, I mean, after they broke up their conference in the building, what happened?

A. Well, as clearly as I can remember, they left, and we went in.

Q. Now, who is 'they'?

A. Mr. Stegmann and this other man with him.

Q. But Winans remained there? A. Yes.

Q. Then you and Mr. Bogar went into the building with Winans?

A. Yes, and he wrote out a check.

Q. Then this check was written out for $90 here?

A. Yes, sir.

Q. Made payable to Mr. Bogar? A. Yes.

Q. What did you do then?

A. Well, we took off.

Q. Well, you came out of the building. Where was your car?

A. Well, it was—I don't remember which side of the building it was on or right in front, but it was right close up.

Q. Right close up. As you came out, did you see

(Testimony of Retlaw Haynes.)

anything, any more of Stegmann and this other man?

A. I don't remember of having seen them.

Q. Then you left Dee? A. Yes.

Q. And drove toward Hood River?

A. Yes, sir."

Testimony of Lawrence Bogar

(Tr. of R. 1662-3)

"Q. Will you just tell us what took place after you got back to Paul Winans' place?

A. Well, when we arrived we waited about half an hour, well, maybe about 20 minutes to a half hour while Stegman and Mr. Winans were in the building.

Q. Now what building are you referring to?

A. The building, it is on the left hand side of the road going up. There was an office, he had a desk in the room there. I forget whether it was a home or not.

Q. Walter Stegmann and Paul Winans were in there, you say, for about how long?

A. Oh, I would say 20 minutes, half hour, something like that."

(Tr. of R. 1664)

"Q. After Walt Stegmann and Paul came out of Paul's office, what did you do?

A. We went in the office and figured up the time, and he paid me, paid both of us by check, one check for both of us, and we made arrangements to come back next Saturday and finish up the survey. Mr. Winans gave me his telephone number and said he would like to have us back the next following Saturday.

(Testimony of Lawrence Bogar.)

Q. What time was that, approximately, when you got through and got your check and were ready to leave?

A. Oh, it must have been around eight o'clock, something like that.

Q. Did you leave for Portland when you had finished this and gotten your check? A. Yes.

Q. Now, when you came out of this office, were Walt Stegmann and this other man still there?

A. No, I don't believe they were there. Never saw them.

Q. Was there anyone around there at the time that you left besides Winans and Ross Winans?

A. Not to my knowledge. We waited until they got through with their business so we could go in and get straightened up on our pay that day.

Q. Did you, while you were there, Mr. Bogar, see Mr. Parker, who is the gentleman sitting just behind the attorneys there; did you see him up there on the 18th day of August?

A. I don't believe so, no."